(27,868)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 511.

EDWARD S. ATWATER, PETITIONER,

vs.

STEPHEN G. GUERNSEY, SAMUEL H. BROWN, AND CHARLES A. HOPKINS, TRUSTEES IN BANKRUPTCY OF MORTON ATWATER ET AL., &c.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1920.

1 *Cla[illegible] of Edward S. Atwater.*

In the United States District Court for the Southern District of New York.

In Bankruptcy.

In the Matter of ATWATER, FOOTE & SHERRILL, Bankrupts.

STATE OF NEW YORK,
County of Dutchess, ss:

At Poughkeepsie in the Southern District of New York on the 27th day of Aug. 1918, Edward S. Atwater of Poughkeepsie in the County of Dutchess in the Southern District of New York and made oath,

1st. That Eliot Atwater one of the above named firm of Atwater, Foote & Sherrill and one of the persons whom a petition for
2 adjudication of bankruptcy has been filed and who have been duly adjudicated as bankrupts, was, at or before the filing of said petition and still is, justly and truly indebted to said Edward S. Atwater in the sum of Seventy five Thousand Dollars ($75,000).

2nd. That the consideration of said debt is as follows: Moneys advanced to Eliot Atwater as an individual and the debt is past due.

3rd. That no part of said debt has been paid.

4th. That there are no offsets or counterclaims to the same.

5th. Deponent makes this claim against all individual property of Eliot Atwater coming into the hands of the trustee in bankruptcy including the proceeds of the sale of a seat in the New York Stock Exchange when the same is received by said trustee.

6th. That said creditor, has not, nor has any person by order of said creditor received any manner of security for said debt whatever.

Letter of Attorney to Frank B. Lown, Attorney at Law.

You are hereby authorized by said creditor by the person making the foregoing deposition, who is duly authorized thereto to appear for and represent said creditor and vote for said creditor in
3 any proceedings, or meeting, which may be had or called in the above entitled proceeding, in Court, before the Referee in Bankruptcy or elsewhere and particularly to vote for said creditor in the choice of a trustee of said bankrupt whenever such selection is held, to accept or in your discretion oppose confirmation of, any composition offered by or in behalf of said bankrupt, and to receive and receipt for any and all moneys which may be or may become payable to said creditor therein or for on account of said debt.

In witness whereof said creditor has hereunto signed his name and affixed his seal, when signing the deposition preceding, the 27th, day of August, 1918.

EDWARD S. ATWATER.

Subscribed and sworn to before me this 27th day of August, 1918.

GEORGE H. SHERMAN,
Notary Public.

4 *Answer of Trustees to Petition of Edward S. Atwater.*

United States District Court for the Southern District of New York.

In Reclamation.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F. FOOTE, and HAROLD W. SHERRILL, Individually and as Co-partners Doing Business as Atwater, Foote & Sherrill, Bankrupts.

To the United States District Court for the Southern District of New York:

Stephen G. Guernsey, Samuel H. Brown, and Charles A. Hopkins, in answer to the petition of Edward S. Atwater respectfully show and allege to this Court:

1. That they have no knowledge or information sufficient
5 to form a belief as to the truth of the allegations contained in the petition of Edward S. Atwater filed with this court, except that they are Trustees in bankruptcy of Atwater, Foote & Sherrill,

Wherefore, your petitioners pray the Court for an order dismissing the petition of Edward S. Atwater and for an order declaring the property described in said petition to be an asset of and the property of the co-partnership estate in the above entitled proceeding.

Dated, September 11, 1918.

STEPHEN G. GUERNSEY.
SAMUEL H. BROWN,
CHARLES A. HOPKINS,
Trustees.

C. W. H. ARNOLD,
Attorney for Trustees,
54-56 Market Street,
Poughkeepsie, N. Y.

6 COUNTY OF DUTCHESS,
State of New York, ss:

Samuel H. Brown, being duly sworn, deposes and says that he is one of the trustees of the estate of the above-named bankrupts; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters

therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

SAMUEL H. BROWN.

Sworn to before me this 12th day of September, 1918.
J. B. VAN DE WATER,
Notary Public.

7 *Petition of Trustees to Expunge Claim.*

United States District Court, Southern District of New York.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F. Foote, and Harold W. Sherrill, Individually and as Co-partners Doing Business as Atwater, Foote & Sherrill, Bankrupts.

To Harry Arnold, Esq., referee in bankruptcy:

The petition of Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins respectfully shows:

1. That they were duly elected Trustees in Bankruptcy of the assets of the above-named bankrupts, and duly qualified and are acting as such.

2. That a proof of debt of Edward S. Atwater was filed against the individual estate of Eliot Atwater on August 28th, 1918, for the sum of $75,000, and was allowed in said sum.

8 3. That the said claim should not have been allowed for the reason that the claim on the face thereof is insufficient and incomplete, and does not set forth a lawful claim against the estate of Eliot Atwater, and for the further reason that the said Edward S. Atwater has heretofore fully and absolutely released any and all claims which he might have against Eliot Atwater for the sum of $75,000, set forth in said claim.

4. That no previous application for the order asked for herein has been made.

Wherefore petitioners pray that the said proof of debt be re-examined, rejected and expunged.

Dated, N. Y., December 7th, 1918.

STEPHEN G. GUERNSEY,
SAMUEL H. BROWN,
CHARLES A. HOPKINS,
Petitioners.

9 STATE OF NEW YORK,
County of Dutchess, ss:

Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, being severally duly sworn, each for himself deposed and says that he has read the foregoing petition subscribed by him and knows the

contents thereof and that the same is true to the best of his knowledge, information and belief.

STEPHEN G. GUERNSEY.
SAMUEL H. BROWN.
CHARLES A. HOPKINS.

Sworn to before me this 9th day of December, 1918.
[L. S.] L. PARKER FARRINGTON,
Notary Public.

10 *Order Appointing Special Master.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York at the Federal Post Office Building, in the Borough of Manhattan, City of New York, on the 18th Day of January, 1919.

Present, Hon. Julius M. Mayer, District Judge.

In the Matter of ATWATER, FOOTE & SHERRILL, Bankrupts.

Upon reading and filing the annexed certificate of Harry Arnold, Esq., Referee in Bankruptcy herein, it is

Ordered that the matter of the claim of Edward S. Atwater to the proceeds realized from the sale of the Stock Exchange Seat be referred to James G. Graham, Esq., as Special Master, for hearing, determination and report.

J. M. MAYER,
D. J.

11 *Case.*

United States District Court, Southern District of New York.

In Bankruptcy.

No. 25803.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F. FOOTE, and HAROLD W. SHERRILL, Individually and as Co-partners Doing Business under the Firm Name and Style of Atwater, Foote & Sherrill, Bankrupts.

Hearing before Hon. James G. Graham as Special Master at Poughkeepsie, New York, on June 5, 1919, on objection to the claim of Edward S. Atwater for the sum of Seventy-five thousand dollars filed in the estate of Eliot Atwater.

Parties Appear: Messrs. Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, Trustees in person, and by Hon. C. W. H. Arnold and H. H. Kaufman, Esq. of Counsel. Claimant in person and by Frank B. Lown, Esq.

12 By Judge Arnold: The Trustees offer in evidence, release signed by Edward S. Atwater, acknowledged before Notary Public under date of the first day of May, 1912 and also release signed by Edward S. Atwater dated May 1, 1912; the last release being in the sum of $2,010.

It is hereby stipulated and agreed that these copies of the releases be offered and received in evidence with the same force and effect as if the originals had been produced and marked in evidence.

Marked Trustees' Exhibits "A" and "B" as of this date.

Trustees rest.

PAUL J. MILLER, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Lown:

Q. You were a former employee of the firm of Atwater, Foote and Sherrill, were you not?

A. I was.

Q. Since their failure, you have mainly been engaged by the trustees or their counsel in the position incidental to the winding up of the affairs of the firm in bankruptcy?

A. That's right.

13 Q. In that way you have become conversant and know of the different claims that have been filed against the firm?

A. I haven't anything to do with the claims that were filed against the firm. The referee had charge of that. I know in a general way about them.

Q. In a general way they aggregate about how much?

A. The general claims of creditors amount to over $900,000.

Q. Do you know of any creditors who are members of the New York Stock Exchange?

By Mr. Kaufman: Objection as being irrelevant, incompetent and immaterial on the ground that no oral evidence can be introduced to vary the written evidence.

By Special Master: Overruled.

By Mr. Kaufman: Exception.

A. I don't know of any.

Q. Are you in a position to know if there were any?

A. Yes, sir.

Q. Are any of these creditors persons who were members of the New York Stock Exchange at the time these two releases were executed May 1st, 1912?

A. I don't know about that date whether they were creditors or not.

It is stipulated on May 1, 1912 so far as we know, that none of the creditors who are now claimants in this proceeding were members of the New York Stock Exchange.

Q. Have any creditors filed claims claiming to be members
14 of the New York Stock Exchange or claiming any preference from the proceeds of the Stock Exchange Seat by reason of such membership? That you know of?
A. I don't know of any.

By Mr. Kaufman: My objection applies to all testimony given by Mr. Miller.
By the Special Master: Overruled.
By Mr. Kaufman: Exception.

ELIOT ATWATER, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Lown:

Q. You are a member of the former firm of Atwater, Foote and Sherrill?
A. I am.
Q. When was that firm organized or created?
A. June 1, 1912.
Q. Did you have a partnership agreement?
A. We did.
Q. (Paper shown witness.) Is that a copy of the partnership agreement?
A. Yes, sir, that's a copy.

By Mr. Lown: I offer it in evidence.
By Mr. Kaufman: Objection as being incompetent and immaterial and is evidence tending to vary the written release.
By the Special Master: Overruled.
By Mr. Kaufman: Exception.

15 Received in evidence and marked claimant's Exhibit "1" as of this date.

Q. Did you subsequently, you and your partners execute another partnership agreement?
A. Yes, sir, we did.
Q. Do you remember the date when the second one was executed?
A. It was either June 1, 1915 or 1916. It was June 3, 1916.
Q. (Showing witness paper.) Is this a copy of the second agreement entered into between you and your partners?
A. That's the one.

By Mr. Lown: I offer it in evidence.
By Mr. Kaufman: Same objection.

By the Special Master: Same ruling.
By Mr. Kaufman: Exception.

Received in evidence and marked claimant's Exhibit "2" as of this date.

Q. I call your attention to article 2 of the first agreement, claimant's exhibit "1" as of this date, which provides that your contribution shall be the use of the membership in the New York Stock Exchange. Tell the Court what you did in pursuance of your agreement to furnish such Seat.

By Mr. Kaufman: Objection on the ground that this instrument speaks for itself and its interpretation is a question for the Court, and the further ground that there is no proof here that Edward S. Atwater is a party to this agreement.

16 By the Special Master: Overruled.
By Mr. Kaufman: Exception.

A. The first use of the Seat was, it would give the firm a reduced commission.

Q. What did you do with reference to procuring the Stock Exchange Seat and carrying out this obligation on your part?

By Mr. Kaufman: Objection as to the form of the question; that portion of it which he is asked, what did he do to perform his obligation.

Q. What did you do?

A. I made application to the authorities of the New York Stock Exchange to purchase a Seat upon being informed by them that they would sell me one. I went to my father and he furnished me the money to buy the Seat.

Q. How much was it to cost?

A. $73,000 and the transfer fee was $2,000.

Q. Making $75,000 in all?

A. $75,000 in all.

Q. Did your father furnish you the money?

A. He did.

Q. $75,000?

A. $75,000.

Q. What did you do with the money when you received it?

A. Paid it over to the Secretary of the Stock Exchange.

Q. Was the Seat properly transferred or issued to you?

A. The Seat was transferred to me. No evidence being given.

Q. Then you become a member of the Stock Exchange?

A. On May 16, 1912.

17 Q. What was your agreement and what was your course of business with the firm of Atwater, Foote and Sherrill?

A. My agreement with the firm was, that I was to give the use of the Stock Exchange Seat.

By Mr. Kaufman. Objection on the ground it is irrelevant, incompetent and immaterial, being testimony offered to vary a written instrument.

By the Court: Overruled.

By Mr. Kaufman: Exception.

By Mr. Kaufman: I object to all of this testimony on the same ground and the objection shall apply throughout.

By the Court: Same ruling.

By Mr. Kaufman: Exception.

Q. What was your agreement and what was your course of business with the firm of Atwater, Foote and Sherrill?

A. My agreement with the firm was, that I was to give the use of the Stock Exchange Seat.

Q. What does that mean?

A. That we would get the benefit of the reduced commission which the Stock Exchange Seat entitles you to. If they were not members of the Exchange, we would have to be charged by New York correspondents the full commission of $12.50 per hundred, bought or sold.

Q. And the same price on bonds purchased or sold?

A. Yes, sir, $10,000 of bonds.

Q. By becoming a member of the Stock Exchange you were
18 able to do for $2 what otherwise would cost $12.50?

A. The firm as a whole was able to do it for $5 per hundred.

Q. The purchase of stocks by a member of the Stock Exchange can be made at an expense of $2?

A. Could have been in those days.

Q. If you are not a member of the Stock Exchange it would cost $12.50?

A. Yes, sir.

Q. You went down to New York and transacted business down there as a member of the Stock Exchange?

A. I did from that date on.

Q. Did you continue down in New York transacting business as a member of the Stock Exchange from that time down to the time of the failure?

A. I did.

Q. The commissions you earned down there under your partnership agreement, what was done with them?

A. They all accrued to the firm of Atwater, Foote and Sherrill and they were divided and mixed in with the other commissions and profits of the firm as specified in the partnership agreement.

Q. The firm of Atwater, Foote and Sherrill had a correspondent in New York, the firm known as Post and Flagg?

A. Yes, sir, they did.

Q. And another correspondent known as Shearson Hammill & Co.?

A. Yes, sir, Shearson Hamnill & Co.

Q. Were they the only two?

A. They were the only two correspondents.

Q. Were the purchases and sales of securities by the firm of At-

water, Foote and Sherrill from the inception of their busi-
19 ness down to the time of the failure, made through either one or the other of these two houses?

A. They were with a few exceptions, I believe, with some smaller houses we used certain small transactions; to what extent, I do not know.

Q. Was it to a large or small extent?

A. Very small.

Q. The most of your earnings as a member of the New York Stock Exchange came from which of these two houses?

A. Post and Flagg.

Q. Post and Flagg not only had an office and place of business in New York City in which they transacted a general brokers' business, but they had different other offices throughout the country, did they not?

A. Branches and correspondents in a good many cities throughout the country.

Q. Were the purchases and sales made by these branch offices of Post and Flagg throughout the State and throughout the country, all put through by Post and Flagg in New York City?

A. They were.

Q. That was their central office?

A. Yes, sir.

Q. Your earnings as a member of the Stock Exchange; are you able to say whether they were simply the earnings from the business of the firm of Atwater, Foote and Sherrill carried on through Post and Flagg or carried on through Shearson Hammill & Co. or not?

A. My earnings had no connection with the business of Atwater, Foote and Sherrill through either of those two houses.

20 Q. Explain in your own way what you mean by that.

A. I mean that when I went down there with Post and Flagg, they told me they had so many branch houses throughout the country and correspondents that their business came in to New York in the main office there and was put over on the floor of the Exchange, not as individual orders from the various branch houses but as business of Post and Flagg's and they couldn't differentiate between Atwater, Foote and Sherrill's business and the business of their other offices. They would simply give me what business they wanted to with no preference as to whether it was Atwater, Foote and Sherrill or other houses.

Q. You mean to execute on the floor?

A. Yes, sir.

Q. So when you got an order from either Post and Flagg or Shearson Hammill & Co. to buy or to sell stocks or other securities you didn't know whether those orders had any connection with the firm of Atwater, Foote and Sherrill or not?

A. That's right.

Q. In point of fact, are you able to say what proportion of the business carried on or effected by you upon the floor of the Stock Exchange, in fact, came through Atwater, Foote and Sherrill, or

came through other sources in which they had an interest, if you know?

A. I have no way of telling at all.

Q. Are you able to say whether you executed all the orders which the customers of the firm of Atwater, Foote and Sherrill put in here and which they transmitted to Post and Flagg?

21 A. I executed some of them when there was a chance. That's the only way I ever executed any.

Q. You bought and sold as you were directed to, whether the orders came from Atwater, Foote and Sherrill or from any of these other branch houses?

A. I did.

Q. That continued from the beginning until the end of your connection with the firm?

A. It did.

Q. Did the same condition exist as to the transactions of the firm of Atwater, Foote and Sherrill with Shearson Hammill & Co.?

A. The same thing existed there.

Q. Did you also during this entire term execute orders to buy and sell securities for other brokers or other persons, who so far as you knew, were not in any way connected with Atwater, Foote and Sherrill or Post and Flagg or Shearson Hammill & Co.?

A. I executed a great many orders for houses that didn't know the firm of Atwater, Foote and Sherrill existed.

Q. All of your earnings, no matter from what source they came and no matter by whose directions you executed the orders, all went up here to the firm of Atwater, Foote and Sherrill for a division?

A. That's right.

Q. How much of the time were you down in New York City and how much of the time were you up here?

A. I was in New York all the time except occasionally on Saturday morning.

Q. I call your attention to section 2 of article 3 of the

22 original articles of copartnership, being exhibit "1" of this date, and ask what was done in the way of carrying out the provisions of that section?

A. If my memory serves me correctly, interest was paid as per the agreement.

By Mr. Kaufman: I move to strike out the answer.

A. To the best of my recollection, interest was paid to me and by me to my father according to the partnership agreement.

By Mr. Kaufman: I move to strike that out because it isn't in the partnership agreement that he was to pay interest to his father.

Q. You have the fact that for a considerable period, the interest on this $75,000, the cost of the Stock Exchange Seat, was paid to you?

A. Yes, sir.

Q. What did you do with it?

A. I turned it over to my father.

Q. For what purpose?
A. To pay my indebtedness to him; the interest on my indebtedness to him.
Q. Was that the agreement between your father and you, that this interest which was to be paid by the firm to you, should be transmitted to him as interest on the amount he advanced?

By Mr. Kaufman: Objection, first on the ground there is no testimony that there was any agreement between Eliot Atwater
23 and his father, and on the further ground the question is leading and on the ground it is irrelevant, incompetent and immaterial.

Q. State the facts in relation to the paying of the interest?
A. The first few years the money was paid to me and I paid it over to my father because I had agreed to, with him.

By Mr. Kaufman: I move to strike out that portion of the answer in which he states that he had agreed to.
By the Court: Motion granted.

Q. What was the agreement between your father and yourself?

By Mr. Kaufman: Objection as there is no testimony that there was any agreement.

Q. State the talk between yourself and your father, fixing the date as near as you can, with reference to the payment of interest on the $75,000 which you say he advanced to you to buy the Stock Exchange Seat.

By Mr. Kaufman: Objection to the last part of the question.

Q. State the talk in reference to the Stock Exchange Seat?
A. My father told me he would advance the money early
24 in May 1912; that he expected me to pay him interest on the money; I agreed to pay him interest on the money at the rate of 6%.
Q. That being the same you were to get from the firm?
A. I was to be paid that amount by the firm.
Q. You agreed to pay your father a similar amount for the use of the money? A. Yes, sir.
Q. You have stated for a considerable period, the interest was paid by you and transmitted by you to your father; what was the subsequent course of business with reference to that?
A. After that it was paid directly by the firm to my father every six months.
Q. When was the last payment made?
A. I don't know. I would say for about four years by the firm direct and two years by me.
Q. The new articles of copartnership being exhibit "2" of this date, of June 5, 1919, contained a similar provision?
A. It did.

By Mr. Kaufman: I move to strike out all of the testimony of this witness Eliot Atwater on the ground that it is irrelevant, incompetent and immaterial, and on the further ground that it is an attempt to vary the terms of a written instrument which are offered in evidence.

By the Court: Ruling reserved to the end of the case.

By Mr. Kaufman: I reserve the right to cross examine the witness.

25 EDWARD S. ATWATER, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Lown:

Q. What is your business?

A. President of a National Bank in Town.

Q. You are the father of Eliot Atwater?

A. I am.

Q. And of Morton Atwater?

A. I am.

Q. They were each members of the former bond and stock brokerage firm of Atwater, Foote and Sherrill?

A. They were.

Q. Were you consulted concerning the formation of the firm and prior thereto?

A. Yes.

Q. What if any agreement did you make with Eliot with reference to the purchase of a Stock Exchange Seat for the use or advantage of the firm?

By Mr. Kaufman: Objection on the ground it is irrelevant, incompetent and immaterial, and I object to it on the ground it is an improper question; it is leading and assumes an agreement was made, and on the further ground that any testimony he may give is an attempt to vary a written instrument.

By the Court: Overruled.

By Mr. Kaufman: Exception.

26 A. I agreed to advance him the money to buy a Seat on the New York Stock Exchange; he said it would cost $70,000 to $75,000 he thought. I also told him I thought it would be better for him to wait, that Stock Exchange Seats were rather high at that time and that if he waited he could get it for a less price but both Eliot and Morton were quite insistent on having it at that time and they asked me further what, if any, interest would be charged for the money and I told them that the money would bear 6%. They said they thought 5% would be enough but I told them that I thought it ought to bear 6% interest and they assented and agreed to it and said it was satisfactory that it should bear 6%.

Q. How long was that interest paid to you?

A. The interest began I should say, 6 months after I advanced the

money. It was always paid to me from the time that I advanced Eliot the money down to the failure.

Q. The last payment was when?

A. I think it was made December preceding the failure.

Q. That would be December 1917?

A. I think so. The payments made to me were first made to Eliot Atwater; he handed the payments to me and it was kept up for some time, I am unable to state how long. Afterwards, I don't know whether it was because he may have been out of Town or I don't know what the reason was.

By Mr. Kaufman: I move to strike that out.

By the Court: Motion granted.

A. The fact was, after the time he didn't pay and I dunned Morton Atwater for it and he said that he would give it to me which
27 he did immediately and that established a custom with me perhaps, so that after that I asked Morton Atwater, who was here and in the office of the firm, for six months' interest in June and December first and it was sent over to me and I used it in my own way.

By Mr. Kaufman: I interpose the same objection all the way through on the competency and relevancy of his testimony.

By the Court: Same ruling.

By Mr. Kaufman: Exception.

ELIOT ATWATER recalled.

Redirect examination.

By Mr. Lown:

Q. (Book shown to witness.) Is that a copy of the constitution of the New York Stock Exchange?

A. Yes, sir.

Q. Nothing but constitution in there?

A. That's all.

Q. That's a copy of the constitution of the New York Stock Exchange?

A. Yes sir.

Q. Will you look at it? That's a later publication. Are you able to say whether that is a copy of the constitution as it was in 1912 with reference to Stock Exchange Seats?

A. If there is any amendment in there since 1912 it would
28 show the date of the amendment. Section 3 hasn't been amended since 1912.

Q. Has there been any amendment to the constitution since 1912?

A. Not that I know of.

By Mr. Lown: I offer in evidence so much of the constitution in question as refers to the purchase of Stock Exchange Seats. any pre-

requisites to such purchase or any provisions as to the sale or other disposition of such Seats.

By Mr. Kaufman: Objection as being irrelevant, incompetent and immaterial.

By the Court: Overruled.

By Mr. Kaufman: Exception.

I understand in your brief that you will point out just what portions of this book that is offered in evidence.

By Mr. Lown: Yes.

Q. Were you familiar with the provisions of this constitution?

A. Yes, sir.

Q. At the time of the formation of the copartnership with reference to the purchase of Seats and any prerequisites to such purchases?

A. Yes, sir.

Q. Did you know the provisions concerning the obtaining or filing with them a release or releases as to debts?

A. It is so stated in the constitution.

Q. Did you communicate to your father when you asked him to buy the Stock Exchange Seat or at any time before the execution of this release, the necessity for such releases?

29 By Mr. Kaufman: Objection as being irrelevant, incompetent and immaterial; whatever might have been done prior to the execution of this release is merged in this instrument and is irrelevant.

By the Court: Overruled.

By Mr. Kaufman: Exception.

A. Yes, sir.

Q. What did you tell him it was necessary for him to do?

A. I told him it would be necessary since I had borrowed the money from him, to sign this release as furnished by the Stock Exchange in order to protect such creditors as might be members of the Stock Exchange, against any prior lien on the Seat in case of failure.

By Mr. Kaufman: I move to strike it out on the ground that they have offered in evidence the rules of the Stock Exchange and they speak for themselves.

By the Court: Overruled.

By Mr. Kaufman: Exception.

By Mr. Kaufman:

Q. It was before he actually signed the release?

A. Yes, sir.

I will reserve my examination.

30 EDWARD S. ATWATER, recalled.

Redirect examination.

By Mr. Lown:

Q. When your son presented these releases to you, tell the Court what he said to you with reference to the necessity of their execution.

By Mr. Kaufman: Objected as being irrelevant, incompetent and immaterial and an attempt to offer oral evidence to vary a written instrument and on the further ground whatever agreements were made prior to the execution of this instrument were merged in the statement.

By the Court: Overruled.

By Mr. Kaufman: Exception.

A. He handed me the paper and said it was necessary for me to sign it in accordance with the rules of the Stock Exchange because the rule said about claims of members on each other, it was necessary to waive my rights in accordance with that; I supposed it was something like a private social club.

By Mr. Kaufman: I move to strike that out.

By the Court: Motion granted.

Q. That was done to protect the claims of members of the Stock Exchange.

A. He told me it was necessary for me to sign that paper
31 in accordance with the rules of the Stock Exchange; that it didn't amount to anything except to give the members of the Stock Exchange their claims they might have against each other precedence over myself. I said I didn't think that amounted to anything and I signed it and was perfectly willing to do so although I didn't write to the Stock Exchange for any rules.

Cross-examination.

By Mr. Kaufman:

Q. When did you have your first conversation with either Mr. Atwater or Mr. Foote or Mr. Sherrill with reference to the formation of the firm of Atwater, Foote and Sherrill?

A. It was some time before. Mr. Foote said that he thought it would be a good thing if they formed a copartnership between Morton and Eliot Atwater and Foote and Sherrill and that one of the boys could become a member of the Stock Exchange and have the advantages which were great from a money point of view that such membership would give, and he spoke to me some time before the matter was at all settled, months I should say. I told him I would think it over and I did think it over and it seemed to me to be a pretty good thing perhaps to enter this partnership. I don't know as it is

necessary to justify myself in my conclusions but I thought Foote and Sherrill were perfectly honorable at that time.

32 Q. Did you take part in the conferences with Mr. Foote and Mr. Sherrill which finally resulted in the formation of this firm?

A. No, sir.

Q. You admit signing these releases which were marked in evidence as Trustees exhibits "A" and "B" as of this date?

A. I signed them.

Q. To whom did you deliver them?

A. I think to Eliot Atwater.

Q. Who was present at the time that you originally had the conversation with your son respecting the purchase of the Seat?

A. I think probably Mr. Foote was present.

Q. Did you personally read the rules or constitution of the Stock Exchange?

A. No.

Q. You stated your recollection is that during the first two years the checks were turned over to you by Eliot Atwater?

A. Yes, sir.

Q. Whose checks were turned over?

A. I don't know; they were given to me by him. I don't know whose they were.

Q. Were they the firm's checks made to the order of Eliot Atwater and endorsed by him?

A. I don't know; he gave them to me.

Q. You remember being called as a witness at an examination held before the Referee in this matter at the first meeting of creditors?

A. Yes, sir.

Q. I now read from page 1691 of the testimony taken at the first meeting of creditors under date of July 18, 1918:

"(Q.) What talk was there about financing it as to whether they would need any capital?

33 (A.) The first talk was that I said I would furnish the means to buy a Seat on the New York Stock Exchange which represented a cost probably of $75,000. That was not enough. Harold Sherrill felt and Gilbert Foote felt and also my boys felt that they needed more money to do the business they ought to do, and I said I was ready to contribute some more."

Q. Do you remember so testifying?

A. That's correct.

I am reading from page 1694 of the same testimony:

"(Q.) Do you know that your Son had to make a statement that he was the sole owner of the Seat on the Stock Exchange without any incumbrance?

(A.) That was the rule of the Exchange.

(Q.) Assuming that that was the provision of the Exchange and that was what your Son did sign, I am asking you now if what he signed was true?

(A.) I think you better ask him.
(Q.) I put it on the assumption?
(A.) I think he is the best witness to that.
(Q.) Assuming that that was the provision of the Exchange and that was what your Son did sign, I am asking you now if what he signed was true?
(A.) I think he is the best witness to that. I suppose it was. I don't know what it was he signed.
(Q.) I am simply saying this: My understanding is, of the
34 rules of the Stock Exchange, that there has to be a full release and the person who is to become owner of that Seat, has to make a statement, a positive statement, perhaps an affidavit that he is the absolute owner of that Seat unincumbered. Did you understand that that was the rule?
(A.) I presume I did.
(Q.) Assuming that you so understood and assuming that your Son did sign such a statement, that I am the sole owner of this and there is no incumbrance on that, I am now asking if what your Son signed was true or not?
(A.) Yes, I suppose it was.
(Q.) That was one source of the capital that the firm of Atwater, Foote and Sherrill were to have, was it not?
(A.) Yes, sir, that was it."

Q. Do you remember so testifying?
A. I don t remember. You are reading a long statement there.
Q. Do you remember testifying to this question which I will repeat?

"(Q.) Assuming that you so understood and assuming that your Son did sign such a statement, that I am the sole owner of this and there is no incumbrance on that, I am now asking if what your Son signed was true or not?
(A.) Yes, I suppose it was.
(Q.) That was one source of the capital that the firm of Atwater, Foote and Sherrill were to have, was it not?
(A.) Yes, sir, that was it."

35 Q. I ask you if you recall so testifying?
A. I remember testifying in the case but I couldn't say that I remember that question.
Q. Do you deny testifying to that?
A. I don't remember it.
Q. If you so testified, that was the truth?
A. I testified to the truth as I agreed to.
Q. I read from page 1695 of the same testimony:

"(Q.) Another portion of the capital was what your Son Morton was to put in, wasn't it, $50,000?
(A.) Yes, sir, or Morton and Eliot together; they were to furnish some money. Harold Sherrill claimed they needed more money

and Gilbert Foote claimed they needed more money to do the amount of business they hoped to do."

Q. Do you remember so testifying?
A. Yes.
Q. I read from page 1763 of the testimony taken at the first meeting of creditors under date of July 18, 1918:

"(Q.) At the time it was paid over and the Seat purchased, you were obliged to sign a full release that you had no claim, moral or otherwise, against the Seat?
(A.) I signed a paper and if you will get the paper, it will speak for itself.
(Q.) At the time you signed the paper, did you make any agreement with your Son that he obligated himself to return the
36 money to you?
(A.) I don't know that I did.
(Q.) Was anything said by him as to the re-payment of this money to you and when?
(A.) No, I don't suppose there was."

Q. Do you recall so testifying?
A. If it is read, I suppose I did.

"(Q.) When did you first make up your mind that you would present a claim for that amount of money?
(A.) When I was put into the Bankruptcy Court, the whole matter was referred to my attorneys for their opinion.
(Q.) And they advised you to put in the claim for the $75,000? Do you know as a matter of fact that your Son has placed in his schedules, a statement here that he owes you $75,000?
(A.) No, I don't know it."

Q. Do you recall so testifying?
A. I suppose I did since you read it.
Q. I am reading from the same page of the testimony, 1764:

"(Q.) I now show you the schedules of Eliot Atwater in which he says he owes you $75,000. Have you any memorandum of that amount at all?
(A.) No.
(Q.) Did he ever agree to repay you $75,000 at the time you loaned it to him?
(A.) No, I don't think he did."

37 Q. Do you recall so testifying?
A. Since you read it: I suppose I did.
Q. I now read from page 1765 of the same testimony:

"(Q.) It has been stated here in evidence that the interest was paid to you by the check of the firm. Would that change your opinion?
(A.) I think it was generally so.
(Q.) Paid by the check of Atwater, Foote and Sherrill?
(A.) Yes, sir.

(Q.) The interest was paid to you from June 1, 1912 until when about?

(A.) Up to the time of the failure. I guess that last payment made was the December payment of 1917."

Q. Do you remember so testifying?

A. I think I testified so this morning.

Q. Do you remember so testifying at the examination at the first meeting of creditors held on July 18, 1918?

A. Since you have read it, I suppose I did testify so.

Q. I am now reading from page 1765:

"(Q.) After you advanced the $75,000 as you have testified to for the purchase of the Seat, was the amount so advanced ever discussed between you and your Son? If so, when?

(A.) I don't think I discussed it with him.

(Q.) That was never made the subject of a conversation wherein he agreed to repay you the money, until when?

38 (A.) I don't know. I got into the hands of the Court.

(Q.) Has he ever agreed to repay that money directly to you?

(A.) I don't remember about it."

Q. Do you recall so testifying?

A. Since you read it, I suppose I did.

Q. I am reading from the minutes taken at the first meeting of creditors. If you did so testify at said meeting, was it true?

A. I should have to answer that by saying that it was true, but I think there should be an explanation made about it.

By Mr. Kaufman: I move to have the latter part of the answer stricken out.

By the Court: Motion granted.

Q. I am asking if that is what you testified to? Was it true at the time you testified to it?

A. I should say that I should want to know more fully than I did at that time what the meaning of the question was. I don't think the question, in the line of what we are discussing now, was fully made out.

By Mr. Kaufman: I move to strike that out as not responsive.

A. I should say that I intended to tell the truth about it. I would want to know the meaning of the question at that time. If
39 it should come up now, I should want to know what the question meant.

Q. I read from page 1766:

"(Q.) I am asking you whether your Son ever made any statement to you relative to it or made any agreement with you for the repayment of this money?"

Q. Is that question perfectly clear to you?

A. Now you see where my doubt comes in.

Q. I am giving you an opportunity to say whether you understand that question. I am asking you whether you understand the question as I now read it to you?

A. No, I do not.

Q. I will read it to you again:

"(Q.) I am asking you whether your Son ever made any statement to you relative to it or made any agreement with you for the repayment of this money?"

Q. Do you understand that question as I read it to you?

A. No, I don't.

Q. What part of it don't you understand?

A. I don't understand whether you mean whether it was a loan or whether you mean that I had some conversation in which I asked him at any one particular time for the return of the money, which I didn't mean to ask him but he could pay it at some time but I didn't specify any particular time when he was to repay it.

40 By the Court:

Q. What part don't you understand about the question?

A. I don't understand what the meaning is, that I loaned him the money, that's one thing; the other thing is, whether there was any talk between Eliot and I as to when the money would be repaid. I could answer that that I didn't have any talk with him as long as the interest was paid to me.

By Mr. Kaufman:

Q. I will read that question again on page 1766:

"(Q.) I am asking you whether your Son ever made any statement to you relative to it or made any agreement with you for the repayment of this money?

(A.) I can't say that he did. I have no note of his.

(Q.) Nor no memorandum or promise?

(A.) No."

Q. Do you recall so testifying?

A. Since you read it I suppose I did.

Q. Have you any doubts as to what this question meant? "Nor no memorandum or promise."

A. I would say I have no memorandum.

Q. Have you any doubts as to what that question meant?

A. I think the question is ambiguous.

41 Q. You are president of a bank here?

A. I am.

Q. You were admitted to practice law in the courts of this State?

A. I was a great many years ago. I don't consider myself a lawyer.

Q. Did you ever read the Poughkeepsie Eagle?

A. Yes, sir, I have subscribed to the paper.

Q. Did you ever see an advertisement in the paper, of Atwater, Foote and Sherrill?

A. I don't think I did.

Q. Do you remember ever seeing an advertisement in that paper or any paper of Atwater, Foote and Sherrill?

A. I don't think so.

Q. Do you recall their advertising at all?

A. I think in the quotations of the Stock Exchange which are published in the paper, there was a memorandum that they were furnished by Atwater, Foote and Sherrill.

Q. Did you ever see an advertisement in any paper, of Atwater, Foote and Sherrill, with the words at the foot of it or anywhere in the advertisement, that they were members of the New York State Exchange?

A. I don't remember.

Q. You had an account with Atwater, Foote and Sherrill?

A. Yes, sir.

Q. You received monthly statements?

A. Yes, sir.

Q. They were on the regular forms that were sent to the customers of Atwater, Foote and Sherrill?

A. Yes, sir.

42 Q. Did you notice on that "Members of the New York Stock Exchange"?

A. I don't remember about it.

Q. You have got some checks from Atwater, Foote and Sherrill?

A. Yes, sir.

Q. Didn't those checks have on the top of them "Members of the New York Stock Exchange"?

A. I am unable to say; I don't remember.

Q. What bank are you connected with?

A. Farmers National.

Q. Did Atwater, Foote and Sherrill have an account with your bank?

A. They did.

Q. Did you ever see a check of Atwater, Foote and Sherrill drawn on that bank?

A. I never saw one unless it was drawn to myself.

Q. There were some drawn to you?

A. Yes, sir.

Q. Didn't you notice on them that they advertised they were members of the New York Stock Exchange?

A. At this lapse of time I cannot state.

Q. Did you have any conversation with any of the customers of Atwater, Foote and Sherrill?

A. I should doubt it very much.

Q. Did you, in the course of your conversation, ever discuss with them, especially at the inception of the firm, what a good thing it was that they were members of the Stock Exchange?

A. I don't remember it.

Q. Didn't you, at the inception of the firm, do all you could to make the business a success?

A. No. I helped them when I could. I gave them some bonds to buy for Vassar College.

43 Q. You referred to some memorandum in which you saw the name of Atwater, Foote and Sherrill, members of the New York Stock Exchange, or some sort of quotation; what particular thing did you refer to?

A. I don't know what it was. I knew they were members of the New York Stock Exchange and knew so at the time.

Q. You saw it on the doors and windows of their place of business, didn't you?

A. Yes, sir, I will say I saw it.

Q. Isn't it a fact it was generally advertised and you knew it that Atwater, Foote and Sherrill were members of the New York Stock Exchange?

A. It is conceded, I think.

Q. I say, members of the New York Stock Exchange.

A. They had membership in the firm.

Q. Do you know they so advertised that they were members of the New York Stock Exchange?

A. I think that they did advertise but I believe it is the custom.

Q. Where there is a membership in the New York Stock Exchange, the firm having its advertises it is, member of the New York Stock Exchange?

A. I think that's the phraseology used.

Q. They used it like any other people?

A. Yes, sir.

Q. And you knew it?

A. Yes, sir.

Q. When you were asked the question as to the capital necessary in financing the firm and you answered that you would furnish the means to buy a Seat on the New York Stock Exchange, what

44 did you understand that to mean by using the word capital?

By Mr. Lown: Objection as being improper in re-direct examination.

By the Court: Overruled.

By Mr. Lown. Exception.

A. I understood this, that the membership in the Stock Exchange would give them certain profits that they couldn't otherwise get through diminished commissions and that would make them money and would be regarded of value in their business and be of advantage to the firm.

Redirect examination.

By Mr. Lown:

Q. Mr. Atwater, this examination of yours at the creditors' meeting was over a year ago, wasn't it?

A. It was.

Q. Have you any present recollection as to what questions were asked or what your answers were?

A. No.

Q. When you say in answer to Mr. Kaufman that you probably testified so and so, you know so because he reads from the stenographer's minutes and you have no reason but what he is reading them correctly?

A. No, that's correct. That's the reason I said what I did say.

Q. Do you know that your Son had to sign any paper down at the New York Stock Exchange before he could be admitted to membership?

A. No.

45 Q. Do you know what the contents of that paper, if he had to sign one, was?

A. No, I don't know.

Q. Do you know that he had to sign any paper stating he didn't owe anybody anything?

A. No, I don't know it.

Q. All you know is that these releases were handed to you with a statement from your Son as you have testified and you have signed them?

A. That's right; I know nothing about what he had to sign.

Recross-examination.

By Judge Arnold:

Q. Mr. Atwater, as a matter of fact, you gave a check to Shearson Hammill & Co. in the purchase of this Stock Exchange Seat for your Son, didn't you?

A. My impression is that I got it through Shearson Hammill & Co. or gave them a check in payment. I don't know what.

Q. Would this refresh your recollection? This was the testimony of one of the members of the firm of Shearson Hammill & Co. that you did give them a check for $75,000. That they had bought the Seat and paid their check to the Stock Exchange or to the owner of the Seat and you subsequently paid them. Have you any recollection of that?

A. I think they were in some way connected with the purchase of the Seat.

Q. To what extent, are you able to state?

A. I think that they probably bought it and advanced the money.

46 Q. The testimony is, on May 16th the firm paid Irving Bunnell $75,000 on account of the purchase of the Stock Exchange Seat and the same day to H. Swords $2,010 probably a transfer fee and we received a check from Edward S. Atwater for $75,000. Would that confirm your recollection?

A. I think that was probably correct. I might have given the check to Eliot Atwater and he gave it to Shearson Hammill & Co

ELIOT ATWATER, recalled.

By Mr. Kaufman:

Q. I read from testimony taken before Harry Arnold, Esq. Referee under date of May 11, 1918, at the adjourned first meeting of creditors, page 351:

"(Q.) You had a membership in the New York Stock Exchange?
(A.) Yes, sir.
(Q.) When did you acquire that membership?
(A.) May 16, 1912.
(Q.) Just prior to going into the firm?
(A.) Yes, sir.
(Q.) Did you contribute that membership to the firm?
(A.) Yes, sir, it was a firm asset."

47 Q. Do you recall so testifying?
A. If you are reading from what I testified, I am willing to agree that is so.
Q. That was the truth?
A. Anything I testified to was the truth.
Q. I am reading from page 354:

"(Q.) Did you have any evidence of indebtedness passing from you to him recognizing your obligations at the time the Seat was bought?
(A.) No, sir."

Q. Do you recall so testifying?
A. I recall that that is a fact.
Q. I am reading from page 361; from the same testimony:

"(Q.) (By Mr. Lown:) My friend Mr. Hasbrouck who is very ingenious has asked you whether you regard your Seat in the Stock Exchange as part of the assets of the firm. Do you mean that?
(A.) I meant it was my contribution; my reason for getting in the firm."

Q. Do you remember so testifying?
A. If it is there I testified to it.
Q. I read from the minutes at the adjourned first meeting of the creditors taken before Harry Arnold, Esq. Referee, under date of June 22, 1918, at page 784:

"(Q.) Did your father Edward S. Atwater sign that release?
(A.) He did.
48 (Q.) Stating to the Exchange and to the secretary that there was no claim whatsoever upon that Seat?
(A.) That's right.
(Q.) And that the Seat was a gift to you?
(A.) I am merely stating my recollection.
(Q.) Was the paper in writing that you produced?

(A.) Yes, sir, what I saw in 1912 and am stating my best recollection.

(Q.) It was your understanding at the time and has been since that time that the papers executed by your father and the conditions under which the purchase of this Seat was made, had to be an absolute gift in order for you to own that Seat?

(A.) I understood it had to be released on his part of all claim.

(Q.) And that he had no claim personally against you for it, is that correct?

(A.) I considered he had a moral claim against me for it.

(Q.) You owed a moral obligation to him?

(A.) Yes, sir."

Q. Do you recall so testifying?

A. If you read it I will agree that I testified to it.

Q. I am reading from page 785 of the same testimony:

"(Q.) So far as the deal itself was concerned from your talks with your father and from the papers you understood had to be signed, in so far as that Seat was concerned, and the purchase price was concerned, it was a gift to you?

49 (A.) I had no talks with my father, but I understood from the paper that there was no claim against me legally by him."

Q. Do you recall so testifying?

A. If it is in there I testified to it.

Q. Was the testimony I have read to you, true and the answers you made, true?

A. Yes, sir, as to my conception of it at that time.

Q. I am reading from page 795 of the same testimony:

"(Q.) Did you ever acknowledge any moral obligation?

(A.) No, sir."

Q. Do you recall so testifying?

A. I don't know what it applies to. If it is in there as my testimony, I said so.

Q. Your father testified he delivered the releases which have been marked in evidence as trustees' exhibits "A" and "B" as of this date, to you. You recall that as being the fact?

A. Yes, sir.

Q. You delivered them to whom?

A. To the Secretary probably.

Q. Your firm advertised extensively, didn't they?

A. I should say so, in the local papers.

Q. You always advertised that the firm of Atwater, Foote and Sherrill were members of the New York Stock Exchange?

A. Yes, sir, I am sure they did.

Q. Didn't you give memorandum books to your customers with that on?

A. I cannot say about that. I think they were on everything.

50 Q. It appeared on everything, including checks and newspaper items and statements sent to your customers?

A. I will grant you that.

Q. In front of the windows at the office up here?

A. Yes, sir.

Hearing adjourned to June 19, 1919 at 11:30 A. M. at the office of H. H. Kaufman, Esq. No. 115 Broadway, New York City.

51 United States District Court, Southern District of New York

In Bankruptcy.

No. 25803.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F Foote, and Harold W. Sherrill, Individually and as Co-partners Doing Business under the Firm Name and Style of Atwater, Foote & Sherrill, Bankrupts.

Adjourned hearing before Hon. James G. Graham as Special Master at the office of H. H. Kaufman, Esq. No. 115 Broadway, New York City on the 19th day of June, 1919, on objection to the claim of Edward S. Atwater for the sum of seventy-five thousand dollars filed in the estate of Eliot Atwater.

Parties appear: Trustees in person and by Hon. C. W. H. Arnold and H. H. Kaufman, Esq. of Counsel. Claimant in person and by Frank B. Lown, Esq. William A. Mulvey, Esq. for Deborah Relyea et al. Charles L. McCann, Esq. for Henry S. Sprague, et al.

52 ELIOT ATWATER, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Lown:

Q. Mr. Atwater, at your examination at the creditors' meeting on May 11, 1918 you stated that you contributed your stock exchange seat and that it was a firm asset. Will you state in what sense or way it was a firm asset?

By Mr. Kaufman: Objection on the ground it is irrelevant, incompetent and immaterial; he cannot do that; he has testified; he cannot explain it in that way.

By the Court: Sustained.

By Mr. Lown: Exception.

Q. Did you mean by your words "firm asset" that the seat belonged to the firm of Atwater, Foote and Sherrill?

By Mr. Kaufman: Objection on the ground it is improper, incompetent and irrelevant and leading.
By the Court: Sustained.
By Mr. Lown: Exception.

Q. Did you use the words in any sense or way except to mean that the possession of the stock exchange seat, the ownership of the stock exchange seat by you was to the advantage of the firm
53 in that it permitted it to buy securities at a lesser cost than it would have been compelled to pay had the transaction not been carried on through a member of the st ck exchange?

By Mr. Kaufman: Objection on the same ground.
By the Court: Same ruling.
By Mr. Lown: Exception.

Q. In your examination upon the same hearing, when you said that the Stock Exchange Seat was your contribution, your reason for getting into the firm, what did you mean to be understood by these words?

By Mr. Kaufman: Same objection.
By the Court: Same ruling.
By Mr. Lown: Exception.

Q. Did you mean that it was your contribution and your reason for getting into the firm because of the advantage that your ownership of the Seat conferred upon the firm of Atwater, Foote and Sherrill?

By Mr. Kaufman: Same objection.
By the Court: Same ruling.
By Mr. Lown: Exception.

Q. Did you mean by the words, "your contribution, your reason for getting into the firm" anything excepting as I have reference to in my last question which was excluded?

54 By Mr. Kaufman: Objection.
By the Court: Same ruling.
By Mr. Lown: Exception.

Q. Did your father ever make any verbal statement to your knowledge, to the Stock Exchange or to any of its officers?
A. Not to my knowledge. No, he did no
Q. Or any statement other than might b implied by the words "of the releases"?
A. Not to my knowledge.
Q. What did you mean by your answer "I had no talks with my father but I understood from the paper that there was no claim against me legally by him"?

By Mr. Kaufman: Same objection.
By the Court: Same ruling.
By Mr. Lown: Exception.

Q. Did you mean by your answer that your father had no claim against you so far as creditors of the firm of Atwater, Foote and Sherrill who were members of the Stock Exchange were concerned?

By Mr. Kaufman: Same objection.
By the Court: Same ruling.
By Mr. Lown: Exception.

Q. Your brother Morton furnished $50,000 of capital for the firm of Atwater, Foote and Sherrill did he not, under the terms of the copartnership?

A. Yes, sir.

55 Q. How was that money raised and furnished, if you know?

By Mr. Kaufman: Objection.
By the Court: Overruled.
By Mr. Kaufman: Exception.

A. He raised it by notes endorsed by my father on two banks in Poughkeepsie.

Cross-examination.

By Mr. Kaufman:

Q. Did you furnish any money as part of the capital of the firm?
A. As it turned out I furnished $10,000 of that $50,000.
Q. Wasn't it originally understood that your brother put up that $50,000?
A. Yes, sir.
Q. You furnished no cash of any kind?
A. I actually did furnish $10,000 of that $50,000 by note; I had a note made against the First National Bank endorsed by my father for $10,000 which was part of the $50,000.
Q. To whose order was the note?
A. I don't remember.
Q. Wasn't it a fact that $50,000 was for your brother's account and not your own?
A. Yes, sir.
Q. In order to enable your brother to borrow the $50,000 from the various banks, you had to sign a note?
A. Yes, sir.

Hearing adjourned to a date to be fixed with the Special Master, and finally adjourned to July 8th, 1919 at Ossining, N. Y.

56 United States District Court, Southern District of New York.

In Bankruptcy.

No. 25803.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F. Foote, and Harold W. Sherrill, Individually and as Co-partners Doing Business under the Firm Name and Style of Atwater, Foote & Sherrill, Bankrupts.

Adjourned hearing before Hon. James G. Graham as Special Master at Ossining, N. Y., on the 8th day of July, 1919 on objection to the claim of Edward S. Atwater for the sum of seventy-five thousand dollars filed in the estate of Eliot Atwater.

Parties appear: Frank B. Lown, Esq. for claimant. Trustees by Hon. C. W. H. Arnold and H. H. Kaufman, Esq. of Counsel.

57 HAROLD W. SHERRILL, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Arnold:

Q. You were a member of the firm of Atwater, Foote and Sherrill?

A. Yes, sir.

Q. That firm was composed of whom?

A. Gilbert F. Foote, Morton Atwater, Eliot Atwater, and Harold W. Sherrill.

Q. Who first suggested the formation of the firm, if you can tell?

A. The first I heard of the formation of the firm, Mr. Foote said that there was a telephone call from Mr. E. S. Atwater to go to the bank and he and I went down to the bank, to the Farmers and Manufacturers National Bank.

Q. What did Mr. Atwater say to you?

A. I asked Mr. Foote about it and he said he and Mr. Atwater had talked the matter over before.

By Mr. Lown: I object to any conversation between the witness and Mr. Foote in the absence of Mr. Atwater.

A. Mr. Foote and I went to Mr. E. S. Atwater's office and were there a short time, as I remember it, one afternoon, I think in May 1912.

Q. The firm was formed the first of June 1912?

A. Yes, sir, the firm was formed then. It was at least thirty days before the formation of the firm.

Q. State what conversation you had with Edward S. Atwater or what conversation was had in his presence?

58 By Mr. Lown: Objection on the ground that the avowed purpose of the evidence is to contradict or enlarge a written instrument to which the witness Sherrill is a party and to which Edward S. Atwater is not a party.

By the Court: I will take it subject to the right to strike it out afterwards.

By Mr. Lown: All of this evidence will be subject to this objection and subject to motion to strike out later.

A. My best recollection is that Mr. Atwater said to Mr. Foote, directed to him and I was present, that he was ready to consider the matter of associating his two boys with us in the firm, Stock Exchange firm. That he would arrange for a Seat for one of his boys and that he would take our business and form a firm, and there wasn't much more to that conversation than just the general outline that he was ready to talk business on the formation of the firm.

Q. Was anything said at that conversation about the $50,000 that was to go in the firm as a contribution of the boys?

A. I don't remember that there was; negotiations went on almost every day, mostly with Morton Atwater after that.

Q. When did the time arrive when all the details in relation to the formation of the firm, were definitely settled.

A. Shortly before the firm opened. I cannot remember the date. We would thrash things over and have conferences.

59 Mr. Morton Atwater would come in the office and Mr. E. S. Atwater traded with Foote and Sherrill as managers and was in the office every day. He had an account with Post and Flagg. It was talked over with E. S. Atwater and Morton Atwater.

Q. I would like to ask you more particularly concerning any conversation in connection with the purchase of the Stock Exchange Seat and what was said by E. S. Atwater in relation thereto?

A. Mr. Atwater said that he didn't want to buy the Seat at that time for the boys; it was undecided which was to take the Seat until about two weeks before the firm was formed. Had several conferences in New York with Shearson Hammill & Co. and Post and Flagg which boy was better fitted to take the Seat on the Stock Exchange and Mr. Atwater said that he thought seats would be cheaper later; that it wouldn't be wise to form the firm now as he thought we could get a seat for less money, but it was finally decided to go ahead and he bought it for $72,000.

Q. And it was put in Eliot's name?

A. Eliot bought the Seat.

Q. What arrangement was made in regard to paying interest upon that investment? How was that discussed?

By Mr. Lown: Objection upon the ground that the articles of copartnership are the best evidence upon that point.

60 Q. Subsequent to the formation of the firm, what did the firm do with reference to paying interest upon this $75,000 to Mr. E. S. Atwater?

A. Pursuant to the partnership agreement, interest was due on the Stock Exchange Seat at 6% on the full cost price of $75,000 and every six months that was charged off against the expenses of the firm.

Q. Paid to whom?

A. I have seen some of the checks and they were made out to E. S. Atwater and I have taken some of them to the bank and he has re-endorsed them and deposited them in his account.

Q. With your firm?

A. With our firm, yes, sir. I don't remember that he didn't do that. I think he did that every time. But there was a time later when the price of Seats went down and it was arranged that the firm would not have to pay the full amount of 6% as an expense on the cost of the Seat and Eliot Atwater arranged that he would pay to his father the difference based on the average cost of Stock Exchange Seats for the last six months.

By the Special Master:

Q. That the firm was to pay the interest on the average cost and the difference between that and the $75,000 was to be paid by Eliot Atwater?

A. Yes, sir. It was understood with Eliot Atwater that on the part of the firm that it would be an expense of the firm so that
61 with Seats selling at $60,000 we should pay interest on this sum instead of paying interest on $75,000 the original cost.

Q. Was the cost of this Seat carried in your capital account?

A. I don't know exactly. I didn't handle that part of the bookkeeping; I understood that it was capital; it was one of the assets of the firm. I cannot answer as to whether there was a capital account or not, I didn't handle the bookkeeping.

By Judge Arnold:

Q. Did you ever see any statement of the firm where its assets and liabilities were set out?

A. I don't remember seeing any until just before the failure.

Q. In addition to putting in the Stock Exchange Seat, was Eliot Atwater and Morton Atwater to furnish a certain amount of capital?

A. Yes, sir, they were to put up all the money that was necessary to make the firm and we were to put in the business that had accumulated over a period of years.

Q. Morton Atwater was to put in $50,000?

A. Yes, sir.

Q. Eliot Atwater's contribution was to be the other?

A. Yes, sir.

Q. You and Mr. Foote put in nothing but the business?

A. That's all.

Q. When I said "the other" I meant he contributed the Seat?

A. Yes, sir.

Q. Therefore you had the assets of the firm consisting of
62 the $50,000 put in and the Seat for the use of the firm and your business?

A. Yes, sir, there were three things: Seat and capital and business.

Cross-examination.

By Mr. Lown:

Q. Wasn't some of those checks for interest made to Eliot Atwater?

A. I don't remember seeing any of them made to Eliot.

Q. Will you say they were not?

A. No, I wouldn't say. Leave it to the check vouchers.

Q. You are familiar with the articles of copartnership?

A. I saw them; I helped.

Q. Don't you know that the Articles of copartnership recited that the interest on this Stock Exchange Seat was to be paid to Eliot Atwater?

A. I understand that it did, yes, sir.

Q. You of course, were familiar with the Articles of copartnership as they were originally drawn?

A. Yes, sir.

Q. You signed them?

A. Yes.

Q. Did they embody the whole agreement between yourself and your two partners as you understood it then?

A. Yes, sir.

Q. You always did business under the original Articles of copartnership until some 5 or 6 years afterwards when you entered into new articles?

A. Four years afterwards, 1916 I think it was.

Q. All the business that was carried on was done under these two Articles of copartnership? You never had any other Articles of copartnership than those agreements?

A. No, those were the only official documents.

63 Q. They remained in full force down to the time of the failure of the firm?

A. Those are the Articles we did business under.

Q. Was there ever any change in them?

A. No, no written change that I know of.

Q. They were the Articles of copartnership under which you were carrying on your business at the time of the failure?

A. Yes, sir.

Q. When these checks or some of them were given to E. S. Atwater you say he would endorse them?

A. Yes, sir.

Q. When he endorsed them what did he do with them?

A. Hand them back for deposit.

Q. What did you or the bookkeeper do when he handed them back for deposit, in the way of giving him credit?

A. I didn't do anything. My recollection is that his account had a credit entry.

Q. For the full amount of the check returned?

A. Yes, sir.

Q. So that at the end the transaction was the same as if he had put in an amount in cash equal to the amount of the check?

A. Yes, sir, it was charged to the expense account and credited to him.

Q. Credited on his account with the firm?

A. Yes, sir, one of his accounts.

Q. You say that at one time the firm didn't pay the full interest upon the $75,000 but upon a lesser amount; when did that arrangement commence?

A. My recollection is the copartnership of 1916, the Cotton Exchange and Stock Exchange interest was based upon the prior
64 value for six months and the books will show. I couldn't tell you how much the amount was.

Q. That was paid on a lesser amount than on the $75,000?

A. Yes, sir.

Q. Do you know of your own knowledge that Eliot made up the difference to his father?

A. He told me he did.

Q. This agreement by which the firm was to pay a lesser amount than the full interest on the $75,000 was that before or after the execution of the second Articles of copartnership?

A. I think it was part of that. The agreement was drawn up to bring that in because the capital of Mr. Atwater had shrunk in Eliot's point of view.

Q. You say the capital of Mr. Atwater. What do you mean the Referee to understand by that?

A. I mean Mr. Foote and I had put in the business and the two Atwater boys the capital and money and the Seat had shrunk in value and the business had increased 3 or 4 times.

Q. Morton Atwater had put in $50,000 in cash?

A. Yes, sir.

Q. Eliot Atwater put in the use of the Stock Exchange Seat?

A. He put in the Seat.

Q. Did you ever read the Articles of copartnership?

A. Yes, sir.

Q. Do the Articles of copartnership state that he put anything in other than the use of the Seat?

A. You will have to show me those words.

Q. You don't know as to that?

A. No, sir.

65 Q. You are sure the Articles were never changed except as they were changed in the second Articles of copartnership?

A. Yes, sir.

Q. You worked under the second Articles of copartnership down to the time of the failure?

A. Yes, sir.

Redirect examination.

By Mr. Arnold:

Q. Do you know the amount of interest paid by the firm upon the Stock Exchange Seat was less, as a matter of fact?

A. It was less.

Q. You wasn't down to Post and Flagg's before the failure, were you?

A. No, sir.

By the Special Master:

Q. As I understand you, you say that according to your recollection that at some period they made a readjustment of the amount of interest that was to be paid by the firm on account of the Stock Exchange Seat and the firm paid interest only on the average price of the Stock Exchange Seat for the preceding six months?

A. That was what the idea of the arrangement was, whether it went up or down, it was to be based upon the selling value for the previous six months.

Q. If, as a matter of fact, the firm did pay the full interest on $75,000, it is your impression that Eliot's account was charged with the difference between the interest on the $75,000 and the average price?

A. No, it was capital expense account; it was one of the expenses of the firm. I think it was arranged by some bookkeeping method whereby Eliot reimbursed his father. The expenses of the firm on the Seat and capital was to be less if the Seat was selling for less than the original cost price and it would be more if it had gone up.

Q. Is it your understanding that if the firm check was given for the full amount, that the firm was reimbursed in some way for interest on the difference by Eliot, either by charging his account or in some other such manner as that?

A. Yes, sir.

Redirect examination.

By Judge Arnold:

Q. Do you know that of your own knowledge?

A. That was the basis of the agreement.

Q. That was to be done and whether it was done, of your own knowledge, you don't know?

A. No, sir.

Q. If the books show a check was given for the full amount according to the previous cost, that naturally would change your opinion?

A. No. The check might have been given and there may have been a bookkeeping transfer.

Q. You mean to say the firm wasn't to pay interest upon the value

of the Stock Exchange Seat at $75,000 if the average value was $50,000?

A. Yes, sir.

Q. Who paid the interest on the $50,000.

A. Charged to expenses.

Q. The firm paid that?

A. Yes, sir.

Q. Continued to do that all the way through?

A. Yes, sir.

By the Special Master:

Q. Did I understand you to say when Mr. Lown was asking you whether there were any changes made in the Articles of co-
67 partnership or in your doing business under them, that there was no written change?

A. Yes, sir, no change.

Q. Was there any change in practice or by consent of the partners, whether it was written or not? Did you in practice adhere to the Articles or in practice, modify them, either between yourselves or written?

A. There was a basis of salary accounts we changed. The whole agreement of 1916 was changed from that of 1912.

Q. I understood you to say to Mr. Lown there was no written changes in the Articles of copartnership?

A. That was a matter that came up before the formation of the firm.

Q. I am asking after the first Articles of copartnership were signed, there were no written changes in them until 1916?

A. No, sir.

Q. Did the firm change them without making any written changes in the Articles themselves?

A. Only in reference to the deposit of one thousand shares of Steel that Mr. Atwater had there.

Recross-examination.

By Mr. Lown:

Q. You have testified as to these two Articles of copartnership under which you did business down to the time of the failure; you have stated that there was a change as to one of the provisions of the Articles of copartnership to the effect that instead of paying interest on the $75,000, the firm was only to pay interest on the average price of a Stock Exchange Seat for the preceding six months?

A. That wasn't the only change made.

68 Q. What other change was made in the Articles of copartnership other than that or in the provisions of the Articles of copartnership?

A. There was a raising of the ratio of drawing among the partners of the firm.

Q. That was embodied in the second Articles of copartnership, was it not?

A. That was one of the changes when the Articles were rewritten.

Q. That change was embodied in the second Articles of copartnership, was it not?

A. Yes, sir.

Q. You have testified to one change in the second Articles of copartnership being the change in the matter of interest on the Stock Exchange Seat. Taking both of the Articles of copartnership in consideration, were there any other changes made in any of the provisions of the second Articles of copartnership?

A. There was no Cotton Exchange Seat in the first Articles of copartnership.

Q. Taking both of them into consideration, were there any changes other than this interest change?

A. Yes, sir, the drawing of the members.

Q. Wasn't that changed in the second Articles of copartnership?

A. That was in the second.

Q. Taking the two Articles of copartnership, were there any changes of any of their provisions excepting that with reference to the payment of interest on the Stock Exchange Seat?

By the Special Master:

69 Q. Were there any changes that do not appear in either agreement?

A. That isn't as Mr. Lown put it.

Q. Were there any changes in practice other than what were embodied in the second agreement?

A. No, sir.

It is hereby stipulated and agreed that briefs are to be exchanged by counsel within ten days after the final closing of the hearing and each attorney is to have a week to reply, and within five days thereafter they are to be submitted to the Special Master.

Mr. Lown is to notify the counsel for the Trustees if he desires a further hearing upon two days' notice after the stenographers' minutes are handed to him.

It is stipulated and agreed that the Seat in the New York Stock Exchange standing in the name of Eliot Atwater was on or about the 6th day of November, 1918, sold by the Trustees in Bankruptcy for the sum of $48,757.80 which sum is in the hands of the Trustees.

70 TRUSTEES' EXHIBIT A.

To all to whom these presents shall come or may concern, Greeting:

Know ye, that I, Edward S. Atwater, of Poughkeepsie, Dutchess County, New York State, for and in consideration of the sum of One Dollar, lawful money of the United States of America, to me in hand paid by Eliot Atwater, of the City, County and State of New York,

the receipt whereof is hereby acknowledged, have remised, released, and forever discharged and by these presents do for myself, my heirs, executors and administrators, remise, release and forever discharge the said Eliot Atwater, his heirs, executors and administrators, of and from all cause and causes of action, agreements, promises, claims and demands whatsoever in law or in equity, which against the said Eliot Atwater, I ever had, now have or which I or my heirs, executors, or administrators, hereafter can, shall, or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents. And more particularly by reason of an advance of the sum of ($73,000) Seventy-three Thousand Dollars, made to said Eliot Atwater, to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange.

In witness whereof, I have hereunto set my hand and seal
71 the 1st day of May, in the year of our Lord one thousand nine hundred and twelve.

(Signed) EDWARD S. ATWATER. [SEAL.]

Sealed and delivered in the presence of:
(Signed MORTON ATWATER.

STATE OF NEW YORK,
County of Dutchess, ss:

On this 1st day of May, one thousand nine hundred and twelve, before me personally came Edward S. Atwater to me known, and known to me to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same for the purpose named.

In testimony whereof I have hereunto subscribed my name, and affixed my seal of office, the day and year last above written.

[SEAL.] (Signed) OTIS W. SHERMAN,
Notary Public.

72 TRUSTEES' EXHIBIT B.

To all to whom these presents shall come or may concern, Greeting:

Know ye, that I, Edward S. Atwater, of Poughkeepsie, Dutchess County, New York State, for and in consideration of the sum of one dollar, lawful money of the United States of America to me in hand paid by Eliot Atwater, of the City, County and State of New York, the receipt whereof is hereby acknowledged have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors, and administrators, remise, release and forever discharge the said Eliot Atwater, his heirs, executors and administrators, of and from all cause and causes of action, agreements, promises, claims and demands whatsoever in law or in equity which against the said Eliot Atwater, I ever had, now have or which I or my heirs, executors, or administrators, hereafter can, shall, or may have for, upon, or by reason of any matter, cause or thing whatsoever from the be-

ginning of the world to the day of the date of these presents. And more particularly by reason of an advance of the sum of Two thousand and ten dollars ($2,010) made to said Eliot Atwater, to enable him, the said Eliot Atwater, to pay his initiation fee to the New York Stock Exchange.

In witness whereof, I have hereunto set my hand and seal
73 the 1st day of May, in the year of our Lord One thousand nine hundred and twelve.

(Signed) EDWARD S. ATWATER. [SEAL.]

Sealed and delivered in the presence of:
(Signed MORTON ATWATER.

STATE OF NEW YORK,
County of Dutchess, ss:

On this 1st day of May, one thousand nine hundred and twelve, before me personally came Edward S. Atwater to me known, and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same for the purpose named.

In testimony whereof, I have hereunto subscribed my name, and affixed my seal of office the day and year last above written.

(Signed) OTIS W. SHERMAN,
Notary Public.

Otis W. Sherman, Notary Public, Dutchess Co., N. Y.

74 CLAIMANT EXHIBIT 1.

Partnership Agreement.

The undersigned, Morton Atwater, Gilbert F. Foote, Harold W. Sherrill and Eliot Atwater, do this day enter into a general partnership under the firm name of Atwater, Foote & Sherrill, for the purpose of transacting a brokerage business in stocks, bonds and commodities, the terms and conditions of such partnership to be as follows:

First.

(*a*) The partnership shall expire by limitation on June 1st, 1915; but it may be dissolved at any time prior thereto by unanimous consent of the partners.

(*b*) Renewal of partnership shall be decided upon at least sixty days before the partnership shall have expired by limitation, and at that time it may be renewed upon terms and conditions to be then agreed upon.

(*c*) No new members shall be admitted to the partnership, except by the unanimous consent of the partners.

(*d*) The death of any member of the firm shall not cause a dissolution of the firm, but the firm shall continue until it shall be dissolved by limitation.

75 Second. It is understood and agreed that Morton Atwater furnishes to the partnership the loan of fifty thousand dollars ($50,000). working capital; Gilbert F. Foote and Harold W. Sherrill, the good-will and the business, of the agreed value of ten thousand dollars ($10,000), which they have established and built up under the firm name of Foote & Sherrill; Eliot Atwater, the use of his membership on the New York Stock Exchange.

Third. The earnings of the firm shall be used and divided as follows:

First. All debts and expenses, including salaries, shall be paid

Second. Every six months there shall be paid to Eliot Atwater, such an amount as shall pay interest for six months at the rate of six per cent (6%), per annum, on seventy-five thousand dollars, ($75,000), being the purchase price and initiation fee of his membership on the New York Stock Exchange.

Third. All remaining profits shall be divided semi-annually among the partners, share and share alike.

Fourth. All the earnings of Eliot Atwater, as a member of the New York Stock Exchange, shall accrue to the firm.

76 Fifth. Each partner, in anticipation of the semi-annual division of profits, shall be permitted to draw on the firm's credit to the extent of four hundred dollars, ($400), per month up to the time of the semi-annual settlement, and the amount of his draft shall be duly charged to his account, but if it shall appear that the earnings of the firm are not sufficient to allow said amount to be drawn, this article may be revised by the agreement of the partnership.

Sixth. If at any time after the second semi-annual settlement, the net profits of the firm shall exceed the amount of ten thousand dollars, ($10,000), for the six months' period elapsed, there shall be set aside and added to the working capital of the firm fifty per cent (50%) of said excess of profits over and above ten thousand dollars, ($10,000), and at the dissolution of the firm all amounts thus added to the working capital shall be divided among the partners share and share alike.

Seventh. The business shall at all times be conducted in conformity with and subject to the constitution and rules of the New York Stock Exchange.

Eighth. No partner, either individually or in association with any other person, shall buy or sell upon margin any securities or commodities, except with the written consent of all the other partners.

Ninth. In the event of the death of any of the partners
77 hereto, his executors or administrators shall be entitled to receive for his estate his share of the undivided net profits of the firm up to the time of his death, and shall also be liable for his share of any debts or liabilities of the firm contracted up to that time; and if the surviving partners shall wish to continue the business, it shall be incumbent upon them to buy the deceased partner's share in the good-will and the business at a price to be determined upon by mutual agreement of all parties concerned.

Tenth. In the event that Eliot Atwater should wish upon the dissolution of the partnership, to sell or transfer his membership on the New York Stock Exchange, he agrees to give to Morton Atwater, Gilbert F. Foote and Harold W. Sherrill, the option to purchase said membership at the price then current, but said option shall expire sixty days after the dissolution of the partnership.

Eleventh. If the said partnership shall be dissolved at the end of three years, or sooner, then the said Morton Atwater, and Eliot Atwater, hereby agrees that for the term of three years after the dissolution of partnership, that they will not jointly or individually establish or associate with any office in the City of Poughkeepsie, New York, which competes for business with any office for the transaction of stock exchange business which may be established by Gilbert F. Foote, and Harold W. Sherrill, or either of them, in said city.

78 Signifying our consent to the above terms and conditions, and our promise faithfully to abide by them; we have hereunto set our hands this 1st day of June, 1912.

HAROLD W. SHERRILL.
MORTON ATWATER.
GILBERT F. FOOTE.
ELIOT ATWATER.

STATE OF NEW YORK,
County of Dutchess,
City of Poughkeepsie, ss:

On this 3rd day of June, in the year one thousand nine hundred and twelve, before me, the subscribers, personally appeared, Morton Atwater, Eliot Atwater, Gilbert F. Foote, and Harold W. Sherrill, to me personally known to be the same persons described in and who executed the foregoing instrument, and they duly acknowledged to me that they executed the same.

WILFRID W. SHERRILL.

79 CLAIMANT'S EXHIBIT 2.

The undersigned Morton Atwater, Gilbert F. Foote, Harold W. Sherrill and Eliot Atwater, do this day enter into a general partnership under the firm name of Atwater, Foote & Sherrill, for the transaction of a brokerage business in stocks, bonds, cotton and commodities, the terms and conditions of such partnership to be as follows:

First. (*a*) The partnership is agreed to be formed on a yearly basis, from June first *to* one year to June first of the following year, and shall continue indefinitely unless notice to the contrary be served by any of the partners sixty days prior to the first day of June of any year.

(*b*) No new members shall be admitted to the partnership except upon such terms as shall be acceptable to the majority of the partners.

Second. The business shall at all times be conducted in conformity with and subject to the rules and constitutions of the New York Stock Exchange and the New York Cotton Exchange.

Third. No partner, either individually or in association with other person-, shall buy or sell upon margin any securities or commodities, except with the written consent of all the other partners.

80 Fourth. All the earnings of Eliot Atwater in commissions on the New York Stock Exchange, shall accrue to the partnership.

Fifth. The earnings of the partnership shall be used and divided as follows:

(1) All debts and expenses, including salaries, shall be paid, said payments to be charged directly to stock and bond earnings.

(2) Interest shall be paid every six months upon the capital furnished to the partnership by Morton Atwater, at a rate not to exceed six (6) per cent per annum, said interest to be charged directly to stock and bond earnings.

(3) Interest at the rate of six (6) per cent per annum shall be paid to Eliot Atwater every six months upon the value of his New York Stock Exchange Seat; the value of said seat to be determined by the average selling price of New York Stock Exchange seats during the six months' period at that time elapsed; said interest to be charged directly to stock and bond earnings.

(4) Interest at the rate of six (6) per cent per annum shall be paid to Gilbert F. Foote every six months upon the value of his New York Cotton Exchange seat; value of said seat to be determined by the average selling price of New York Cotton Exchange seats during the six months' period at that time elapsed; said interest to be charged directly to cotton and commodity earnings.

81 (5) Each partner, in anticipation of the annual distribution of profits, shall be permitted to draw on the firm's profits to the extent of five hundred dollars ($500) per month, said monthly drawing allowances to be charged directly to stock and bond earnings.

(6) All profits from stock and bond dealings in excess of the before mentioned expenses, interest items and monthly drawing allowances, shall be divided annually upon the following basis:

To Gilbert Foote thirty (30) per cent.
To Harold W. Sherrill, thirty (30) per cent.
To Morton Atwater, twenty (20) per cent.
To Eliot Atwater, twenty (20) per cent,

provided that the earnings of Eliot Atwater in commissions upon the New York Stock Exchange for the year then elapsed shall be equal to or exceed in amount the interest paid to him for the same period upon the value of his New York Stock Exchange seat. In the event that said earnings of Eliot Atwater are not equal to amount of said interest, he shall not be entitled to share in the excess profits as above stated, and said share of twenty (20) per cent shall be divided equally between Gilbert F. Foote, Harold W. Sherrill and Morton Atwater.

(7) All profits from cotton and commodities dealings in excess of the before mentioned interest charge, shall be divided annually upon the following basis:

82 To Gilbert F. Foote, thirty-five (35) per cent.
To Harold W. Sherrill thirty-five (35) per cent.
To Morton Atwater fifteen (15) per cent.
To Eliot Atwater fifteen (15) per cent.

Sixth. In the event that Eliot Atwater should wish at any time to sell or transfer his membership upon the New York Stock Exchange, he agrees to give to Morton Atwater, Gilbert F. Foote and Harold W. Sherrill, the option to purchase said membership at the price then current, but said option shall expire sixty days after the granting of the same if not exercised.

Signifying our consent to the above terms and conditions, and our promise faithfully to abide by them, we have hereunto set our hands this 3rd day of June, 1916.

MORTON ATWATER.
HAROLD W. SHERRILL.
GILBERT F. FOOTE.
ELIOT ATWATER.

83 CLAIMANT'S EXHIBIT —.

Extract from Exhibit —, Which Exhibit is the Book Containing the Constitution and By-Laws of the New York Stock Exchange.

Sec. 3. Upon any transfer of membership, whether made by a member voluntarily, or by the governing committee, or the committee on admission in pursuance of the provisions of this constitution, the proceeds thereof shall be applied to the following purposes, and in the following order or priority, viz.:

First. The payment of all fines, dues, assessments and charges of the Exchange or any department thereof against members whose membership is transferred.

Second. The payment of creditors members of the Exchange, or firms registered thereon of all filed claims arising from contracts subject to the rules of the Exchange, if and to the extent that the same shall be allowed by the Committee on Admission.

If said proceeds shall be insufficient to pay such claims as so allowed in full, the same shall be applied to the payment thereof pro rata.

Third. The surplus, if any, of said proceeds shall be paid to the person whose membership is transferred, or to his legal representatives, upon the execution by him or them of a release or releases satisfactory to the Committee on Admission.

84 *Report of Special Master.*

United States District Court, Southern District of New York.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F. Foote, and Harold W. Sherrill, Individually and as Co-partners Doing Business under the Firm Name and Style of Atwater, Foote & Sherrill, Bankrupts.

To the District Judges for the Southern Dis' .ct of New York:

I, James G. Graham, to whom as Special Master was referred the petition of the Trustees in Bankruptcy herein to reject and expunge the claim of $75,000 made by Edward S. Atwater against the individual estate in bankruptcy of Eliot Atwater, do make the following report:

I first took and filed my oath as such Special Master.

Having been attended by the respective parties and their
85 Counsel, I then proceeded to hear the proofs adduced on their behalf, respectively, and the arguments of their Counsel, and I do make the following:

Findings of Fact.

I. That prior to May 1, 1912, the matter of forming a partnership between Morton Atwater, Eliot Atwater, Gilbert F. Foote and Harold W. Sherrill (the latter two comprising the then existing firm of Foote & Sherrill), to which the Atwaters were to contribute money and the use of a seat in the New York Stock Exchange, and Foote and Sherrill were to contribute their established business, had been the subject of various conversations between such parties and Edward S. Atwater, the father of Morton and Eliot Atwater.

II. That on May 1, 1912, said Edward S. Atwater executed and delivered to Eliot Atwater two releases, being Trustees' Exhibits A and B hereto attached.

III. That on May 16, 1912, said Eliot Atwater was elected a member of said New York Stock Exchange, and on that day the firm of

Shearson, Hammill & Co., advanced $73,000 being the purchase price of said seat, and $2,010 the initiation fee in the Exchange therefor, being subsequently reimbursed by Edward S. Atwater for said amounts.

IV. That under date of June 1, 1912, articles of co-part-
86 nership were executed between said Morton Atwater, Eliot Atwater, Gilbert F. Foote and Harold W. Sherrill, and that on June 3, 1916, second articles of co-partnership were executed between the same parties, said articles of co-partnership being attached hereto and marked respectively Exhibits 1 and 2.

V. That said firm was doing business under said second articles of co-partnership at the time of the filing of the petition in bankruptcy herein.

VI. That on May 1, 1912, none of the creditors in this matter were members of the New York Stock Exchange, and that no creditors have filed claims claiming to be members of the New York Stock Exchange, or claiming any preference from the proceeds of the Exchange seat by reason of said membership.

VII. That interest on the amount advanced to Eliot Atwater by Edward S. Atwater for the purchase of said seat in New York Stock Exchange and the initiation fee therein, was regularly paid to Edward S. Atwater at first by Eliot Atwater, and at some subsequent date by the check of Atwater, Foote & Sherrill, to the order of Eliot Atwater, and by him endorsed to his father, or by the check of the firm to Edward S. Atwater directly, every six months from the date of said advance to the December preceding the filing of the petition herein. After June 1, 1916, the firm of Atwater, Foote & Sherrill
paid the interest on the average selling value of the Stock
87 Exchange seat and Eliot Atwater the difference between that amount and interest on $75,000.

And as

Conclusions of Law.

First. That Eliot Atwater became the individual owner of the seat in the New York Stock Exchange on May 16, 1912, and was such individual owner at the time of the filing of the petition in bankruptcy herein.

Second. That said seat was never the property of the firm of Atwater, Foote & Sherrill.

Third. That by the execution and delivery to said Eliot Atwater by Edward S. Atwater of the releases, Trustees' Exhibits A and B herein, said Edward S. Atwater is barred and estopped from asserting a claim to the proceeds of said seat, or as an individual creditor of said Eliot Atwater for the moneys advanced toward the purchase price thereof and for initiation fee in said Exchange as against the Trustees in bankruptcy herein, and the general creditors of the firm of Atwater, Foote & Sherrill.

Fourth. That the petition to reject and expunge the said claim of said Edward S. Atwater for $75,000 as a claim against the individual assets of Eliot Atwater in preference to the claims of the general creditors of the firm of Atwater, Foote & Sherrill, should be granted.

Dated, November 6, 1919.

JAMES G. GRAHAM,
Special Master.

88 *Opinion of Special Master.*

United States District Court, Southern District of New York.

In Bankruptcy.

No. 25803.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F. Foote, and Harold W. Sherrill, Individually and as Co-partners Doing Business under the Firm Name and Style of Atwater, Foote & Sherrill, Bankrupts.

This matter came on before the Special Master on a petition filed by Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, the Trustees in Bankruptcy herein, asking that the claim of Edward S. Atwater against the individual property of Eliot Atwater, above named, coming into the hands of the Trustees in Bankruptcy, including the proceeds of the sale of a seat in the New York Stock Exchange, when the same is received by said Trustees, in the amount of $75,000, be rejected and expunged.

89 The grounds upon which it is sought to defeat said claim set forth in the petition above mentioned are that "it does not set forth a legal claim against the estate of Eliot Atwater, and for the further reason that the said Edward S. Atwater has heretofore fully and absolutely released any and all claims which he might have against Eliot Atwater for the sum of $75,000 set forth in said claim."

Eliot Atwater at the time of the filing of the petition in bankruptcy herein was a member of the firm of Atwater, Foote & Sherrill, of Poughkeepsie, New York, the other members being the persons named in the title of the proceedings herein.

This firm was formed under articles of copartnership, dated June 1, 1912, which expired by limitation therein expressed on June 1, 1915. On June 3, 1916, new articles of copartnership were executed, providing for a partnership on a yearly basis from June first to June first of each year, and to continue indefinitely, but terminable by any partner on sixty days' notice prior to June 1st of any year.

new articles of copartnership were executed, providing for a partnership on a yearly basis from June first to June first of each year, and to continue indefinitely, but terminable by any partner on sixty days' notice prior to June 1st of any year.

These second articles were in force at the time of the filing of the petition herein. It does not appear how the period was covered between the expiration of the first articles on June 1, 1915, and the execution of the second articles on June 3, 1916, but it is a fair assumption that the firm continued its business under the articles first executed during that period.

90 Prior to the formation of the partnership on June 1, 1912, the business had been conducted by the firm of Foote & Sherrill. Morton and Eliot Atwater were the sons of Edward S. Atwater, the president of one of the local banks, a man of large means and one who had been dealing previously with the firm of Foote & Sherrill. The formation of a partnership to consist of his sons and the members of the firm of Foote & Sherrill had been the subject of conferences between the elder Atwater and the other parties for some time previously thereto. There is evidence that these negotiations had been going on for more than thirty days prior to the actual execution of the first articles of copartnership and that finally the elder Atwater announced that he was ready to consider the matter of associating his two boys with the firm of Foote & Sherrill; that he would arrange for a seat for one of his boys and Foote & Sherrill could put in their business and form a firm. Apparently in pursuance of the understanding arrived at between all the parties, including the elder Atwater, arrangements were made to buy a seat on the New York Stock Exchange for Eliot Atwater. This must have been prior to May 1, 1912, as the first step toward the same seems to have been taken on that date when Edward S. Atwater, the father, executed two releases which are Trustees' Exhibits A and B, being the releases referred to in the Trustees' petition herein.

Thereafter and on May 16, 1912, the seat of Irving Bunnell was purchased for Eliot Atwater, and on that day he became a member of the New York Stock Exchange. Payment for the

91 seat was made on that day by the firm of Shearson, Hammill & Co., with whom apparently Edward S. Atwater had an account and they were thereafter reimbursed by him.

It thus appears that prior to the formation of the partnership in question on June 1, 1912, Eliot Atwater was the owner of a seat in the New York Stock Exchange, and that prior to the purchase thereof, his father, the claimant herein, had executed and delivered to him a sealed general release "of all claims and demands whatsoever in law or in equity which against the said Eliot Atwater I ever had, now have, or which I or my heirs, executors or administrators hereafter can, shall or may have * * * and more particularly by reason of an advance of the sum of Seventy-three thousand Dollars made to said Eliot Atwater to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange."

The same day said Edward S. Atwater executed and delivered to Eliot Atwater another release of similar purport except that it referred to the sum of Two thousand and ten Dollars paid as initiation fee to the New York Stock Exchange. It is these two amounts which were paid by Shearson, Hammill & Co., for which Edward S.

Atwater reimbursed them, which make up the amount of the claim in this proceeding.

The Stock Exchange required that before becoming a member, the applicant shall file evidence that there is no claim or lien that may attach to the seat so that the proceeds of any sale thereof shall
92 be wholly applicable to the claims of other members of the Exchange against its owner, as set forth in its Constitution. Eliot and his father testified that at the time this release was executed it was necessary to have this release to comply with this rule of the Exchange, and that is all there was to it, and that it was signed with this understanding. It appears, however, that the elder Atwater was familiar with the terms of the releases and that he had been admitted to the Bar, although he had never practiced to any extent, and he must be presumed to have been conversant with the fact that these releases were full general releases and not qualified in any manner by the terms thereof.

I think the testimony sustains the inference that both he and his son knew that the legal effect of the releases was to discharge any indebtedness on account of the matters set forth therein, as there is testimony from which it would appear that this was assumed to be the fact but that it was thereafter considered as a moral obligation at least by Eliot, and the exact status of his claim was apparently never entirely clear to the elder Atwater from his own testimony on this hearing.

The first articles of co-partnership provided, among other things, as follows:

"Second. It is understood and agreed that Morton Atwater, furnishes to the partnership the loan of Fifty thousand Dollars ($50,000), working capital; Gilbert F. Foote and Harold W.
93 Sherrill the good-will and the business, of the agreed value of Ten thousand dollars, ($10,000) which they have established and built up under the firm name of Foote & Sherrill; Eliot Atwater the use of his membership on the New York Stock Exchange.

* * * * * * *

"Second. Every six months there shall be paid to Eliot Atwater, such an amount as shall pay interest for six months at the rate of six per cent (6%) per annum, on Seventy-five Thousand Dollars ($75,000), being the purchase price and initiation fee of his membership on the New York Stock Exchange.

* * * * * * *

"Fourth. All the earnings of Eliot Atwater, as a member of the New York Stock Exchange shall accrue to the firm.

* * * * * * *

"Tenth. In the event that Eliot Atwater should wish upon the dissolution of the partnership to sell or transfer his membership

on the New York Stock Exchange, he agrees to give to Morton Atwater, Gilbert F. Foote and Harold W. Sherrill, the option to purchase said membership at the price then current, but said option shall expire sixty days after the dissolution of the partnership."

The second articles of copartnership contained the pro-
94 vision as to the payment of interest to Eliot Atwater on the value of his New York Stock Exchange seat, but providing that the value should be "determined by the average selling price of New York Stock Exchange seats during the six months' period at that time elapsed," instead of on the original purchase price. It also contained a provision that Eliot Atwater should not share in the profits unless his earnings and commissions on the Exchange equalled or exceeded the amount paid to him for the same period for interest upon the value of his New York Stock Exchange seat.

The provisions of paragraphs Seventh and Tenth of the first copartnership articles were included in the second articles.

Every six months after the formation of the firm interest was paid at first by the firm to Eliot Atwater, who in turn paid the same to his father, Edward S. Atwater, and then after a time the firm's check seems to have been made out directly to Edward S. Atwater. Under the change made in the second articles as to the basis of value on which interest was to be computed, the difference between interest on such average value and $75,000, was either paid by Eliot Atwater to his father, or if it was paid by the firm it was in turn charged to Eliot's account with the firm, the method not being definitely testified to.

It appears without question that so far as Edward S. Atwater is concerned he received interest on the advance of $75,000 to his
95 son Eliot from the time of the formation of the partnership down to the last interest period preceding its failure.

The claim of Edward S. Atwater is that the seat on the New York Stock Exchange was the individual property of Eliot Atwater; that the proceeds of sale belongs to his individual estate and (it being proven that there were no Stock Exchange creditors whose claims would have preference under its rules) that he as an individual creditor of Eliot is entitled to be paid from such individual estate before any part of it is applied to the payment of firm debts. It has been assumed that the seat was sold, but when and for how much was not proven on the hearings in this matter.

The Trustees claim that the seat is the property of the firm and as such applicable to payment of the firm debts, and that whether the seat was individual or firm property Edward S. Atwater has no claim because of his execution and delivery of the releases hereinbefore referred to, Trustees' Exhibits A and B.

As to the ownership of the seat I think the weight of the evidence establishes that it was at all times the individual property of Eliot Atwater.

The language of the partnership agreement and the practice of all parties under them, seems to me to have greater force than the loose and probably not well considered language used by either Eliot or his

father on their examination in the bankruptcy proceedings.

96 Under the first articles Eliot Atwater furnishes "the use of his membership in the New York Stock Exchange"; there is to be paid him interest on $75,000 "being the purchase price and initiation fee of his membership in the New York Stock Exchange; upon the dissolution of the firm if Eliot wishes "to sell or transfer his membership" the other three parties are to have an option to purchase the same.

In the second articles nothing is said as to what each partner contributes toward the firm, but the other provisions above quoted as to payment of interest and option to purchase also appear.

No testimony was offered by the Trustees showing how the capital account appeared on the books of the firm, although the books were in their possession, and as it was a subject of inquiry on the examination of Harold W. Sherrill, their attention was thereby directed to it, and although Gilbert Foote, the other partner, was present at the same hearing at which Sherrill testified, Foote was not sworn as a witness.

It seems to me that the real question in the case is as to the effect to be given the releases, Trustees' Exhibits A and B.

In support of the claimant's contention there is recited as controlling authority Sterling v. Chapin, 185 N. Y. 395, while the Trustees' counsel relied upon Matter of J. M. Fisk & Co. (claim of Eugene R. Washburn) No. 13213, decided by Hon. Seaman Miller, Referee in Bankruptcy, July 12, 1912, and affirmed without opinion by Judge Holt about February 27, 1913, in the District Court for this District.

97 In Sterling v. Chapin, supra, it appears that the controversy was solely on a partnership accounting between the surviving partner and the representative of the deceased partner, as to whether the surviving partner should be charged with an amount concededly advanced by the deceased partner for the purchase of a seat in the New York Stock Exchange taken in the name of the surviving partner. A release similar to the one in question was executed by the deceased partner but not delivered to the surviving partner, but directly to the Stock Exchange authorities. It appeared that thereafter the defendant entered the amount of the advance in the books of the firm and a charge against himself and continued to make charges therein against himself thereafter for interest on the advances from time to time. No question of the rights of creditors or other outside parties were involved.

The Court of Appeals held that the release did not discharge the indebtedness. Two facts seem to have been of great weight in bringing the Court to this conclusion, one was that the release itself was never delivered to defendant; the other was that the release was executed in the individual name of the deceased partner some time prior to the appearance of the entry whereby the defendant charged himself on the books of the firm, at which time they say it must be assumed that the firm first advanced the money and first became

his creditor, and that it appeared that the firm never executed any release of the account thereafter.

98 These facts which seem to have been of great weight in leading the Court to treat the releases as limited in their effect and for a special purpose only, are distinguishable from the facts in the case under consideration and I am not convinced that on the evidence herein presented, the Court of Appeals would limit or disregard the effect of the releases in question.

In the Fiske case, Eugene R. Washburn, the father, had advanced the money to purchase the Stock Exchange seat, to his son, Clarence Washburn, a member of the bankrupt firm, and had executed a release similar to the one in question. The release, as in the Chapin case, was not delivered to the son, but by the father was delivered directly to the Exchange authorities. After the delivery of the release to the Exchange, the son executed and delivered to the father a note for the amount advanced, and it was on this note that the father sought to recover as an individual creditor of the son. I think Counsel for the claimant is in error in his view that the father sought to uphold the claim only as one against the general assets of the firm, on the ground that the money he had advanced to his son enabled the latter to purchase the seat and thus created a fund out of which the Exchange creditors had been reimbursed in part, and their claims against the general fund reduced to that extent. He did advance this argument as a reason why he should have a claim as a general creditor of the firm, but an inspection of the

99 record on file in the office of the Clerk of the District Court in this District shows that he did claim directly as an individual creditor of the son and that this claim was rejected by the Referee as well as his claim to subrogation as a general creditor. The Referee plainly held that as to his claim to be an individual creditor of his son on the note, he was estopped by the release, which he held was good as to all the world.

It seems to me that the facts in the Matter of Fiske more nearly resemble those in the claim under consideration than do those in the Chapin case, and as the Referee in the Fiske matter was upheld by the District Court in this District I am constrained to regard it as controlling the disposition of this claim.

In my opinion, therefore, the claim of Edward S. Atwater for $75,000 against the individual estate in bankruptcy of Eliot Atwater, should be rejected and expunged.

Dated, November 6, 1919.

JAMES G. GRAHAM,
Special Master.

100 *Opinion — Mayer, D. J.*

United States District Court, Southern District of New York.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F. Foote, and Harold W. Sherrill, Individually and as Co-partners Doing Business under the Firm Name and Style of Atwater, Foote & Sherrill, Bankrupts.

Memorandum.

The report of Special Master Graham has taken the form of findings of fact and conclusions of law which clearly set forth his decisions both in respect to the law and the facts. In addition, he has filed a carefully and clearly expressed opinion which renders unnecessary any elaboration by the court.

I agree with both the reasoning and conclusion of the Special Master and his report is therefore confirmed.

101 It may be noted that I am of the opinion that the Stock Exchange seat was at all times the individual property of Eliot Atwater as indicated in the opinion of the Special Master.

January 6, 1920.

JULIUS M. MAYER,
District Judge.

102 *Order of January 14, 1920.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York at the Federal Post Office Building, in the Borough of Manhattan, City of New York, on the 14th Day of January, 1920.

Present: Hon. Julius M. Mayer, District Judge.

In the Matter of MORTON ATWATER et al., Individually and as Co-partners Composing the Firm of Atwater, Foote & Sherrill, Bankrupts.

Upon reading and filing the opinion of James G. Graham, Esq., as Special Master, dated November 6th, 1919, and filed in the office of the Clerk herein, the report of said James G. Graham, Esq., as Special Master, dated November 6th, 1919, and filed in the office of the Clerk herein, the objection to the claim of Edward S. Atwater, and upon the testimony taken before said Special Master on the hearing on objections to the said claim, and after hearing

103 C. W. H. Arnold and Henry H. Kaufman, Esqs., in support of the motion to confirm the Special Master's report recommending a rejection of the said claim of Edward S. Atwater, and Frank B. Lown, Esq., in opposition thereto, and due deliberation having been had, it is

Ordered that the report of James G. Graham, as Special Master, be and the same hereby is in all respects confirmed. It is further

Ordered that the proof of claim filed by Edward S. Atwater against the individual estate of Eliot Atwater be expunged and disallowed; and it is further

Ordered that it be adjudged and decreed that the proceeds realized from the sale of the Stock Exchange Seat standing in the name of Eliot Atwater be regarded as an asset of the individual estate of Eliot Atwater and it is further

Ordered that the Trustees herein be and they hereby are directed to pay to James G. Graham, Esq., the sum of $— for services rendered by him as Special Master.

JULIUS M. MAYER,
United States District Court Judge.

104 *Petition for Appeal.*

United States District Court, Southern District of New York.

In the Matter of MORTON ATWATER et al., Individually and as Co partners Composing the Firm of Atwater, Foote & Sherrill, Bankrupts.

To the Honorable Judges of the United States District Court for the Southern District of New York:

Your petitioner, Edward S. Atwater, conceiving himself aggrieved by the order made and entered herein on the 14th day of January, 1920, wherein it was, among other things, ordered, adjudged and decreed that the report of James G. Graham, as Special Master, dated November 6th, 1919, and filed in the office of the Clerk of this Court, be in all respects confirmed, and also that the proof of claim filed by your petitioner against the individual estate of Eliot Atwater be expunged and disallowed, does hereby petition for an appeal from said order to the United States Circuit Court of Appeals for the Second Circuit, and prays that his appeal may be allowed and that a citation may be granted directed to Stephen G. Guern-

105 sey, Samuel H. Brown and Charles A. Hopkins, as Trustees in Bankruptcy herein, commanding them to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said proceeding duly authenticated may be transmitted to the said, United States Circuit Court of Appeals for the Second Circuit.

Dated, January 19th, 1920.

EDWARD S. ATWATER,
By FRANK B. LOWN,
His Attorney.

The foregoing appeal is hereby allowed this 19th day of January, 1920.

JULIUS M. MAYER,
U. S. District Judge.

106 *Notice of Appeal.*

United States District Court, Southern District of New York.

In the Matter of MORTON ATWATER et al., Individually and as Copartners Composing the Firm of Atwater, Foote & Sherrill, Bankrupts.

SIRS:

Please take notice that Edward S. Atwater hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order made and entered herein on the 14th day of January, 1920, wherein it was, among other things, ordered, adjudged and decreed that the Report of James G. Graham, as Special Master, dated November 6th, 1919, and filed in the office of the Clerk of this Court be in all respects confirmed and also that the proof of claim filed by Edward S. Atwater against the individual estate of Eliot Atwater be expunged and disallowed, and the said Edward S. Atwater
107 hereby appeals from each and every part of said order as well as from the whole thereof.

Dated, January 19th, 1920.

Yours, etc.,

FRANK B. LOWN,
Attorney for Edward S. Atwater.

Office and Post Office Address,
Poughkeepsie, New York.

To: C. W. H. Arnold, Esq., and Henry H. Kaufman, Esq., attorneys for Stephen G. Guernsey, Samuel H. Brown, and Charles A. Hopkins, as trustees in bankruptcy.

108 *Assignment of Errors.*

United States District Court, Southern District of New York.

In the Matter of MORTON ATWATER and Others, Individually and as Copartners Composing the Firm of Atwater, Foote & Sherrill, Bankrupts.

Now comes Edward S. Atwater and makes the following Assignment of Errors:

First. That the order of this Court made on the 14th day of January, 1920, is contrary to the evidence and contrary to law.

Second. That the Court erred in holding that the report of James G. Graham, Special Master, dated November 6th, 1919, should be confirmed in all respects.

Third. That the Court erred in holding that by the execution and delivery to said Eliot Atwater by Edward S. Atwater of the releases (the Exhibits A and B offered in evidence on this proceeding), said Edward S. Atwater is barred and estopped from asserting a claim to the proceeds of said seat or as an individual creditor of
109 said Eliot Atwater for the money advanced toward the purchase price thereof and for initiation fee in said exchange as against the Trustees in Bankruptcy herein and the general creditors of Atwater, Foote & Sherrill.

Fourth. That the Court erred in holding that the petition to reject and expunge the claim of Edward S. Atwater for $75,000 as a claim against individual assets of Eliot Atwater in preference to the claims of the general creditors of Atwater, Foote & Sherrill, should be granted, and in expunging and disallowing such claim.

Wherefore, the said Edward S. Atwater prays that the said order of this Court made and entered herein on the 14th day of January, 1920, be reversed, and for such other and further relief as may be proper.

FRANK B. LOWN,
Attorney for Claimant, Edward S. Atwater.

Office and Post Office Address, Poughkeepsie, New York.

110 *Citation.*

By the Honorable Julius M. Mayer, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Stephen G. Guernsey, Samuel H. Brown, and Charles A. Hopkins, trustees in bankruptcy of Morton Atwater et al., individually and as copartners composing the firm of Atwater, Foote & Sherrill, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 18th day of February, 1920, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Edward S. Atwater is appellant and you are appellees to show cause, if any there be, why the order in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 19th day of January, in the year of our Lord One Thousand Nine Hundred

and twenty, and of the Independence of the United States the One Hundred and forty-fourth.

JULIUS M. MAYER,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

111 *Stipulation re Contents of Record.*

United States Circuit Court of Appeals.

In the Matter of MORTON ATWATER and Others, Individually and as Copartners Composing the Firm of Atwater, Foote & Sherrill, Bankrupts; Edward S. Atwater, Appellant.

It is hereby stipulated that the following papers be printed as the record on the appeal of Edward S. Atwater to the Circuit Court of Appeals.

1. Claim of Edward S. Atwater.

2. Answer of Trustees.

3. Petition of Trustees dated December 7th, 1918, to expunge claim.

4. Order appointing James G. Graham, Special Master.

5. Testimony and Exhibits before the Master (except only Section 3 of Article XV of the Constitution of the New York Stock
112 Exchange need be printed and not the entire book offered in evidence).

6. Report of the Special Master.

7. The Opinion of the Special Master.

8. The Order of Judge Mayer of January 14th, 1920.

8½. Opinion Judge Mayer.

9. The appeal papers (except that the bond of the appellant need not be printed).

Dated, New York, January 19, 1920.

FRANK B. LOWN,
Attorney for Appellant.
C. W. H. ARNOLD,
Attorney for Appellees.

113 *Stipulation.*

United States District Court, Southern District of New York.

In the Matter of MORTON ATWATER and Others, Individually and as Copartners Composing the Firm of Atwater, Foote & Sherrill, Bankrupts.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, February 16, 1920.

FRANK B. LOWN,
Attorney for Appellant.
C. W. H. ARNOLD,
Attorney for Appellee.

114 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

In the Matter of MORTON ATWATER and Others, Individually and as Copartners Composing the Firm of Atwater, Foote & Sherrill, Bankrupts.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 16th day of February, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the said United States the one hundred and forty-fourth.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

115 *Opinion—Manton, C. J.*

United States Circuit Court of Appeals for the Second Circuit.

In the Matter of MORTON ATWATER, ELIOT ATWATER, GILBERT F. Foote, and Harold W. Sherrill, Individually and as Co-partners Doing Business as Atwater, Foote & Sherrill, Bankrupts; Edward S. Atwater, Appellant.

Before Ward, Hough, and Manton, Circuit Judges.

Appeal from an Order and Decree of the District Court for the Southern District of New York.

Petition of Trustees.

A petition was filed in the district court by Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins to expunge the
116 claim of Edward S. Atwater. Petition granted. Claimant, Edward S. Atwater, appeals.

Frank B. Lown, for appellant.
C. W. H. Arnold, for respondent-trustees.
Daniel P. Hays, Henry H. Kaufman, of counsel.

MANTON, *Circuit Judge:*

The firm of Atwater, Foote & Sherrill were stock brokers engaged in business at Poughkeepsie, New York. A petition in bankruptcy was filed against this firm and it was duly adjudicated a bankrupt. One of the members of the bankrupt firm was Eliot Atwater, a son of the appellant. The firm was formed under articles of co-partnership under date of June 1, 1912, which partnership expired by limitation June 1, 1915. On June 1, 1916, new articles of co-partnership were executed providing for a partnership on a yearly basis from June to June of each year, and thereafter continued indefinitely but terminable by any partner on sixty days' notice prior to June 1 of any year.

At the time of the adjudication in bankruptcy, the firm existed under the terms of the second agreement dated June 3, 1916. Before this partnership was formed, Mr. Foote and Mr. Sherrill were doing business as Foote & Sherrill. About June 1, 1912, they were joined by Morton and Eliot Atwater, the sons of the appellant,
117 who was the president of a bank in Poughkeepsie and a man of large means. The father had theretofore done business with the firm of Foote & Sherrill. As a result of his active negotiations, the terms of the co-partnership were arrived at. The articles of co-partnership provided among other things, as follows:

"Second. It is understood and agreed that Morton Atwater, furnishes to the partnership the loan of Fifty thousand Dollars ($50,000), working capital; Gilbert F. Foote and Harold W. Sherrill the good-will and the business, of the agreed value of Ten thousand dollars, ($10,000) which they have established and built up under the firm name of Foote & Sherrill; Eliot Atwater the use of his membership on the New York Stock Exchange.

* * * * * * *

"Second. Every six months there shall be paid to Eliot Atwater, such an amount as shall pay interest for six months at the rate of six per cent (6%) per annum, on Seventy-five Thousand Dollars ($75,000), being the purchase price and initiation fee of his membership on the New York Stock Exchange.

* * * * * * *

"Fourth. All the earnings of Eliot Atwater, as a member of the New York Stock Exchange shall accrue to the firm.

* * * * * * *

118 "Tenth. In the event that Eliot Atwater should wish upon the dissolution of the partnership to sell or transfer his membership on the New York Stock Exchange, he agrees to give to Morton Atwater, Gilbert F. Foote and Harold W. Sherrill, the option to purchase said membership at the price then current, but said option shall expire sixty days after the dissolution of the partnership."

On May 16, 1912, a seat on the exchange was purchased by Eliot Atwater; payment therefor was made by Edward S. Atwater. Thus, at the time of entering into the copartnership agreement, Eliot Atwater individually owned a seat on the New York Stock Exchange. Prior to June 1, 1912, the appellant executed and delivered to Eliot Atwater a sealed general release

"of all claims and demands whatsoever in law or in equity which against the said Eliot Atwater I ever had, now, have, or which I or my heirs, executors or administrators hereafter can, shall or may have * * * and more particularly by reason of an advance of the sum of $73,000 made to said Eliot Atwater to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange."

A release of like import was executed and delivered on the same day to Eliot Atwater and referred to a payment of Two thousand
119 and ten dollars paid as initiation fee to the New York Stock Exchange. This sum was paid by the appellant, thus making Seventy-five thousand dollars, which is the subject of the claim presented by the appellant to the trustees and which has been expunged by order of the court below.

The questions presented on this appeal are: (1) Was the stock exchange seat owned by the firm or was it the individual property of Eliot Atwater? (2) Is the appellant estopped from asserting his claim as against the firm or individual members? In other words, what is the effect of the release given?

It is explained by the appellant that the release in question was given solely for the purpose of satisfying the rule of the New York Stock Exchange requiring a member to own his seat free from all liens and encumbrances. The requirement for this is that found in Article 15 of the Constitution of the New York Stock Exchange which provides as follows:

"Sec. 3. Upon any transfer of membership, whether made by a member voluntarily, or by the governing committee, or the committee on admission in pursuance of the provisions of this constitution, the proceeds thereof shall be applied to the following purposes, and in the following order of priority, viz:

First. The payment of all fines, dues, assessments and charges of the Exchange or any department thereof against members whose membership is transferred.

120 Second. The payment of creditors members of the Exchange, or firms registered thereon of all filed claims arising from contracts subject to the rules of the Exchange, if and to the extent that the same shall be allowed by the Committee on admission. If said proceeds shall be insufficient to pay such claims as so allowed in full, the same shall be applied to the payment thereof pro rata.

Third. The surplus, if any, of said proceeds shall be paid to the person whose membership is transferred, or to his legal representatives, upon the execution by him or them of a release or releases, satisfactory to the Committee on Admission."

It is apparent from the date of purchase of the membership by Eliot Atwater and from the terms of the co-partnership agreement, which are quoted above, that Eliot Atwater individually owned the membership in the Stock Exchange and did not convey it to the firm at any time during the existence of the co-partnership. The co-partnership agreement provides that Eliot Atwater should not share in the profits unless the earnings and commissions on the Exchange equaled or exceeded the amount paid to him for the same period for interest upon the value of his membership in the New York Stock Exchange. The co-partnership articles further provided that every six months after the formation of the firm, interest was to be paid by the firm to Eliot Atwater. He, in turn, paid the same to
121 his father, the appellant, and after a time, the firm's checks were made out directly to the appellant. Thus, it will be observed that Edward S. Atwater received interest on the Seventy-five thousand dollars which he advanced to his son, Eliot Atwater, at the time of the formation of the copartnership, and this continued down to the last interest period before the bankruptcy. It is con-

tended by the appellant that the membership in the New York Stock Exchange, being the individual property of Eliot Atwater, the proceeds of the sale belong to his individual estate. That since it appears there were no stock exchange creditors whose names have a preference under the rules, an individual creditor, such as the appellant, is entitled to be paid from such individual estate before any part of it be applied to the payment of the firm's debts. Apparently the membership has been sold.

What effect have the releases upon appellant's claim? Releases may be invalid for lack of proper formality, for want of legal consideration, for incapacity of releasor to execute by reason of the absence of real consent thereto, or owing to illegality. On the other hand, a release is not invalid because improvidently executed or because the releasee did not need the money to be paid and voluntarily waived payment of the full consideration therefor. The scope and extent of a release depend as a rule upon the interest of the parties as expressed in the terms of the particular instrument. Parol evidence is inadmissible to prove that claims not included in the writing were understood at the time of the executing of the
122 release to be embraced in the transaction. Parol evidence cannot be offered to vary the document. (St. Louis & S. F. Ry. Co. vs. Dearborn Co., 60 Fed. 880; Holbrook vs. Sperling, 239 Fed. Rep. 715). Parol evidence is admissible where, while not changing the nature of the contract, it shows the reason for the execution of the release and points out its use and application. But a valid release as conclusively estops the parties from reviving and litigating the claim released as a final act and it forever extinguishes a personal right of action. It completely discharges and extinguishes all rights and claims of the releasor against the releasee which are included in the release, and this is true even though the releasee fails fully to perform a promise which was the consideration for the release, unless the operation of the release was based upon full performance. Even if invalid, it is binding upon the parties until attacked in a proper manner and set aside. Where a release is invalid because of mistake, fraud, duress or undue influence, not inherent in its execution, it may, upon proper application, be cancelled by a court of equitable jurisdiction. A release, like every other contractual obligation, has for its primary rule of construction, the intention of the parties. This must govern. This intention, however, must be clear from the words used in the instrument and not from matters de hors the writing. (Hoes vs. Van Hoesen, 1 Barb. Chan. (N. Y. 379); Sherburne vs. Goodwin, 44 N. H. 271). The release here does not contain any limitation which would indicate an intent at the time of its execution, of a con-
123 ditional delivery so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation and thus defeat the claims of other creditors. The appellant was an attorney at law, although not actually engaged in practice. He had full opportunity to read and understand the force and effect of the document he executed. He released the whole world from payment of the sum involved. By

this document, he represented not only to the Stock Exchange members, but to everyone that so far as he was concerned, his son owed him nothing for the Stock Exchange membership. Nor can we support the claim of the appellant, because he received interest on the loan of Seventy-five thousand dollars from his son against this sealed and solemn instrument of release. We think he is estopped from asserting his claim.

In Sterling vs. Chapin (185 N. Y. 395), the action was for a co-partnership accounting between two brothers, the plaintiff's testator and the defendant. No rights of creditors arose. The question decided by the court was one as to the rights between the partners. The deceased partner had advanced all the money for the purchase of a membership in the Stock Exchange. The deceased partner had given a release to the Exchange similar to the one here. It will be noted that the delivery was made to the Stock Exchange and not to the borrower of the money. An account was opened in the books of the co-partnership several years after the execution
124 of the release and it was carried on such books at the time of its dissolution and, in that account, the defendant each year, exclusive of the one ending when the partnership was dissolved, was charged with interest on the balance shown due from him and was credited with various payments in addition to which the defendant, more than two and a half years after the execution of the release, wrote to his brother a letter which acknowledged his indebtedness to him of the amount charged against him. The court in holding the obligation a valid one, said:

"What I emphasize is, that we have here the uncontradicted and unexplained admission of the defendant by entries which are binding upon him, that at a certain date the copartnership advanced money to or for him, and that this copartnership indebtedness was not affected by a prior individual release of one copartner."

We are of the opinion that the court below did not err in sustaining the Special Master who reported, expunging the claim of the appellant.

Order affirmed.

125 *Dissent—Ward, C. J.*

United States Circuit Court of Appeals for the Second Circuit.

In the Matter of Morton Atwater, Eliot Atwater, Gilbert F. Foote, and Harold W. Sherrill, Individually and as Co-partners Doing Business as Atwater, Foote & Sherrill, Bankrupts; Edward S. Atwater, Appellant.

Before Ward, Hough, and Manton, Circuit Judges.

Ward, *Circuit Judge* (dissenting):

A release under seal cannot be contradicted by one party as against the other or as against a third party who has been prejudiced by

relying upon it. As, for instance, in this case against the Stock Exchange or Stock Exchange creditors for whose benefit the release was executed. But obviously both parties to a release may agree
126 that between themselves it really meant something different from what it said. In this case, for instance, if there had been no bankruptcy Eliot Atwater and his father, Edward S. Atwater, could have agreed that the release though general was made for the benefit of the Stock Exchange creditors only and that the transaction was as between themselves a loan by the father of the price of the seat to the son. If that was the fact no other creditor of Eliot Atwater could prevent his father from recovering and collecting a judgment from him for the amount of the loan. So, if Eliot Atwater had died, any admission by him to this effect could have been availed of by his father, Sterling v. Chapman, 185 N. Y. 395.

On the other hand, any creditor of Eliot who had relied upon the release and who would be prejudiced by its being contradicted might insist upon its literal enforcement as to him. This is on the ground of estoppel.

But there is no evidence whatever in this case that any creditor of the firm or of Eliot Atwater individually did so rely or even knew of the existence of the release and I think there can be no estoppel in favor of the trustee in bankruptcy representing the creditors in general. It is to be noted that Edward S. Atwater is not claiming title to the bankrupt's seat or to its proceeds but is simply asking to prove his claim for money loaned to the bankrupt. I think the proof of claim should be allowed and if in the course of the bankruptcy proceedings the trustee can show that any creditor or creditors by relying on the release have been prejudiced relief may be given to them.

127 *Order for Mandate.*

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court-rooms, in the Post Office Building, in the City of New York, on the 29th Day of May, One Thousand Nine Hundred and Twenty.

Present: Hon. Henry G. Ward, Hon. Charles M. Hough, Hon. Martin T. Manton, Circuit Judges.

In the Matter of Morton Atwater et al., Individually, etc., Doing Business as Atwater, Foote & Company, Bankrupts; Edward S. Atwater, Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

128 This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
C. M. H.

Endorsed: United States Circuit Court of Appeals, Second Circuit.—In re Morton Atwater et al.—Order for Mandate.—United States Circuit Court of Appeals, Second Circuit.—Filed June 1, 1920.—William Parkin, clerk.

129 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 128 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Morton Atwater, et al., Bankrupts. Edward S. Atwater, Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23rd day of June, in the year of our Lord One Thousand Nine Hundred and Twenty and of the Independence of the said United States the One Hundred and forty-fourth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

[SEAL.]

WM. PARKIN,
Clerk.

130 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honoralde the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Edward S. Atwater is appellant, and Stephen G. Guernsey, Samuel H. Brown, and Charles A. Hopkins, Trustees in Bankruptcy of Morton Atwater, Eliot Atwater, Gilbert F. Foote and Harold W. Sherrill, individually, and as co-partners doing business as Atwater, Foote & Sherrill, are respondents, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
131 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,868. Supreme Court of the United States, October Term, 1920. No. 511. Edward S. Atwater vs. Stephen G. Guernsey et al., trustees, etc. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 28, 1920. William Parkin, clerk.

132 United States Circuit Court of Appeals for the Second Circuit.

EDWARD S. ATWATER, Petitioner,

against

STEPHEN G. GUERNSEY and Others, Trustees.

It is hereby stipulated that the certified transcript of record on file in the Supreme Court of the United States in the above case on the motion for a Writ of Certiorari be taken as a return to the Writ of Certiorari issued by the said Supreme Court.

Dated, New York, October 27, 1920.

FRANK B. LOWN,
Attorney for Edward S. Atwater.
C. W. H. ARNOLD,
Attorney for Stephen G. Guernsey and Others.

133 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, October 30, 1920.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

134 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Morton Atwater et al., Bankrupts. Return to Certiorari.

135 [Endorsed:] File No. 27,868. Supreme Court U. S., October Term, 1920. Term No. 511. Edward S. Atwater, petitioner, vs. Stephen G. Guernsey et al., trustees, etc. Writ of certiorari and return. Filed Nov. 3, 1920.

INDEX.

Cases Cited.

Notice of Motion.

United States Circuit Court of Appeals,

For the Second Circuit.

In the Matter

of

Morton Atwater, Eliot Atwater, Gilbert F. Foote and Harold W. Sherrill, individually and as co-partners, doing business as Atwater, Foote & Sherrill,

Bankrupts,

Edward S. Atwater,

Petitioner.

To Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, trustees in bankruptcy of the above named bankrupts and their solicitor.

You Will Please Take Notice that the petitioner, Edward S. Atwater, in the above-entitled cause, on Monday the 4th day of October, 1920, at the opening of court on that day or as

soon thereafter as counsel can be heard will submit to the Supreme Court of the United States in its Court Room at the Capitol in the City of Washington, D. C., the within motion for a writ of certiorari from said Supreme Court to the United States Circuit Court of Appeals for the Second Circuit; and that such motion will be made upon the petition and brief hereto annexed, and a copy of the record in this cause.

Dated, August 12th, 1920.

FRANK B. LOWN,
Solicitor for Petitioner,
Poughkeepsie, N. Y.

Motion.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER of MORTON ATWATER, ELIOT ATWATER, GILBERT F. FOOTE and HAROLD W. SHERRILL, individually and as co-partners, doing business as ATWATER, FOOTE & SHERRILL, Bankrupts, EDWARD S. ATWATER, Petitioner.	Motion for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Comes now Edward S. Atwater by Frank B. Lown and Abram J. Rose, his counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, require said court to certify to this court for its review and determination a certain cause in said Court of Appeals lately pending wherein the petitioner, Edward S. Atwater was appellant and

Motion.

Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, trustees in bankruptcy of the above named bankrupts were appellees; and to that end he now tenders herewith his petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

FRANK B. LOWN,
ABRAM J. ROSE,
Counsel for Petitioner.

Petition.

SUPREME COURT OF THE UNITED STATES.

In the Matter of Morton Atwater, Elliot Atwater, Gilbert F. Foote and Harold W. Sherrill, individually and as co-partners, doing business as Atwater, Foote & Sherrill, Bankrupts, Edward S. Atwater, Petitioner.	Petition for writ of certiorari to the United States Circuit Court of Appeals, Second Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your petitioner, Edward S. Atwater, respectfully shows:

The question of law sought to be reviewed by this Court, decided adversely by the Court below by a divided vote, is whether parol evidence was admissible to show the purpose for and the con-

dition on which a general release under seal, executed by the petitioner Edward S. Atwater to his son Eliot Atwater, of an advance to his son of the purchase price of a seat in the New York Stock Exchange in compliance with the rules and regulations of said Exchange, was given; which purpose and condition by the mutual agreement and understanding of the party was to protect creditor members of the Exchange only, and was not intended to be effective in favor of general creditors of the debtor. Such parol evidence, it is claimed, was permissible under well established rules laid down by this Court and other Federal Courts, as well as by the State Courts, and that the ruling below is in direct conflict with the decision by the New York Court of Appeals in *Sterling* v. *Chapin*, 185 N. Y., 395.

The decree of the Circuit Court of Appeals sought to be reviewed herein was entered on the 1st day of June, 1920, and affirmed by a divided vote an order and decree of the United States District Court, Southern District of New York, expunging the claim of Edward S. Atwater against the individual estate of Eliot Atwater, one of the members of the firm of Atwater, Foote & Sherrill, the above named bankrupts, for the sum of Seventy-five Thousand Dollars ($75,000) monies advanced by the petitioner and used in the purchase of a seat for said Eliot Atwater in the New York Stock Exchange.

The trustees in bankruptcy of said firm objected to the allowance of the claim and moved

to expunge it, whereupon the matter was referred to a Special Master who made his report on the facts and held as a conclusion of law that the petitioner was estopped from asserting his claim by reason of the execution of certain releases given by him to said Eliot Atwater at the time of the advancement of the sum claimed and the purchase of the seat referred to, and recommended that the petition of the trustees to reject and expunge such claim should be granted.

The report of the Special Master was confirmed by the District Court and an order was entered expunging and disallowing said claim.

From such order an appeal was taken by the petitioner to the Circuit Court of Appeals for the Second Circuit, which court as said, affirmed, by a divided vote, the decree appealed from.

The facts are as follows:

The firm of Atwater, Foote & Sherrill were stockbrokers engaged in business at Poughkeepsie, New York.

Against this firm a petition in bankruptcy was filed and it was duly adjudicated a bankrupt. Eliot Atwater, a son of the petitioner, was one of the members of the bankrupt firm.

On May 16, 1912, prior to the organization of the firm, a seat on the New York Stock Exchange was purchased by Eliot Atwater with money advanced to him for that purpose by his father, Edward S. Atwater, the petitioner. The price paid for the seat was Seventy-three Thousand Dollars ($73,000) and the initiation fee was Two Thousand and Ten Dollars ($2,010) making Seventy-five Thousand Dollars ($75,000) which is the subject of the claim presented by the petitioner to the trustees and which has been disallowed and expunged by order of the court below. The Constitution of the New York Stock Exchange in reference to the transfer of membership therein provides as follows:

> "Sec. 3. Upon any transfer of membership whether made by a member voluntarily or by the Governing Committee or the Committee on Admission in pursuance of the provisions of this Constitution, the proceeds thereof shall be applied to the following purposes and in the following order of priority, viz:
>
> FIRST: The payent of all fines, dues, assessments and charges of the Exchange or any department thereof against members whose membership is transferred.
>
> SECOND: The payment of creditors' members of the Exchange, or firms registered

thereon of all filed claims arising from contracts subject to the rules of the Exchange, if and to the extent that the same shall be allowed by the Committee on Admission. If said proceeds shall be insufficient to pay such claims as so allowed in full, the same shall be applied to the payment thereof pro rata.

THIRD: The surplus, if any, of said proceeds shall be paid to the person whose membership is transferred or to his legal representatives upon the execution by him or them of a release or releases satisfactory to the Committee on Admission." (Record, p. 83, fols. 247-249.)

Under this provision of the Constitution, the rules of the Exchange require that before an applicant may purchase a seat thereon, he must file a general release from his debts and obligations. For the purpose of complying with these provisions and rules, on May 1, 1912, Edward S. Atwater, the petitioner, at the time of the purchase of the seat for his son, executed and delivered to him a sealed general release

"of all claims and demands whatsoever in law or in equity which against the said Eliot Atwater I ever had, now have or which I or my heirs, executors or administrators hereafter can, shall or may have * * * and

more particularly by reason of an advance of the sum of $73,000 made to said Eliot Atwater to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange."

A similar release was executed and delivered by the appellant to his son referring to the sum of $2,010 paid as initiation fee to the Exchange. Both of these releases were for the nominal consideration of $1.00 (Record, p. 70, fol. 208; p. 72, fol. 214).

Before the execution and delivery of these releases, the petitioner was told by his son that they were only for the purpose of complying with the requirements of the Exchange and in order to protect such creditors as might be members of the Exchange against any prior lien on the seat in case of the financial failure of the owner.

On this subject the testimony of the petitioner was as follows:

"He (Eliot) handed me the paper and said it was necessary for me to sign it in accordance with the rules of the Stock Exchange because the rules said about claims of members upon each other * * * it was necessary to waive my rights in accordance with that. * * * He told me that it was necessary for me to sign that paper in

accordance with the rules of the Stock Exchange, that it didn't amount to anything except to give the members of the Stock Exchange and the claims they might have against each other precedence over myself. I said I didn't think that amounted to anything and I signed it though I didn't write to the Stock Exchange for any rules." (Record, pp. 30-31, fols. 89-91.)

In this testimony the petitioner is corroborated by his son, Eliot, who testified that after borrowing the $75,000 from his father he brought him the releases and told him that it was necessary for him to sign them "in order to protect such creditors as might be members of the Stock Exchange." (Record, p. 29, fol. 86.)

On June 1, 1912, after the purchase of the seat and after the giving of the releases mentioned, the firm of Atwater, Foote & Sherrill, the bankrupts, was formed under articles of co-partnership which expired by limitation on June 1, 1915. On June 1, 1916, new articles of co-partnership were executed providing for a partnership on a yearly basis from June to June of each year and thereafter indefinitely, terminable however by any partner on 60 days' notice prior to June 1 of any year. At the time of the adjudication in bankruptcy, the firm existed under the terms of the second agreement dated June 1, 1916. The articles of co-partnership in force

at the time of the adjudication in bankruptcy provided among other things as follows:

"SECOND: It is understood and agreed that Morton Atwater furnishes to the partnership the loan of Fifty Thousand Dollars ($50,000) working capital; Gilbert F. Foote and Harold W. Sherrill the good-will and the business, of the agreed value of Ten Thousand Dollars ($10,000) which they have established and built up under the firm name of Foote & Sherrill; Eliot Atwater the use of his membership on the New York Stock Exchange * * *.

THIRD: Every six months there shall be paid to Eliot Atwater such an amount as shall pay interest for six months at the rate of six per cent (6%) per annum on Seventy-five Thousand Dollars ($75,000) being the purchase price and initiation fee of his membership on the New York Stock Exchange * * *.

FOURTH: All the earnings of Eliot Atwater as a member of the New Stock Exchange shall accrue to the firm. * * *

TENTH: In the event that Eliot Atwater should wish upon the dissolution of the partnership to sell or transfer his membership on the New York Stock Exchange he

agrees to give to Morton Atwater, Gilbert F. Foote and Harold W. Sherrill the option to purchase said membership at the price then current but said option shall expire on 60 days after the dissolution of the partnership." (Record, pp. 74-77, fols. 222-239.)

It is conceded that there are no creditors of the firm of Atwater, Foote & Sherrill, members of the New York Stock Exchange, and no claim has been filed with the trustees by any creditors who are members of such Exchange.

In the court below two questions were presented for decision:

(1) Was the Stock Exchange seat owned by the firm or was it the individual property of E. t At ater?

(2) Is the appellant (the petitioner) estopped from asserting his claim as against the firm or individual members?

The learned court below was unanimously of the opinion that the seat was the individual property of Eliot Atwater, but was divided in its opinion as to the effect of the releases given.

Circuit Judge Ward in an opinion dissenting from that of Circuit Judges Manton and Hough

pointed out that while a release under seal could not be contradicted by one party as against the other or as against a third party who has been prejudiced by relying on it, in the absence of such prejudice both parties to a release may agree that as between themselves it was to be limited to a particular purpose and there being no evidence whatever in the case that any creditor of the bankrupt firm or of Eliot Atwater individually relied upon or even knew of the existence of the releases, there could be no estoppel in favor of the trustees in bankruptcy representing the creditors in general. The following quotation is taken from JUDGE WARD'S dissenting opinion:

> "In this case, for instance, if there had been no bankruptcy, Eliot Atwater and his father, Edward S. Atwater, could have agreed that the release though general was made for the benefit of the Stock Exchange creditors only and that the transaction was as between themselves a loan by the father of the price of the seat to the son. If that was the fact, no other creditors of Eliot Atwater could prevent his father from recovering and collecting a judgment from him for the amount of the loan. So if Eliot Atwater had died, any admission by him to this effect could have been availed of by his father. *Sterling* v. *Chapin,* 185 N. Y., 395. On the other hand, any creditor of Eliot

who had relied upon the release and who would be prejudiced by its being contradicted might insist upon its literal enforcement as to him. This on the ground of estoppel.

But there is no evidence whatever in this case that any creditor of the firm or of Eliot Atwater individually did so rely or even know of the existence of the release and I think there can be no estoppel in favor of the trustee in bankruptcy representing the creditors in general."

The majority of the court however, consisting of JUDGES HOUGH and MANTON, placed their decision wholly on the ground that parol evidence was inadmissible to show the *purpose* for and the *condition* on which the releases were executed and that their effect must be determined solely by their express terms. We quote the following from the majority opinion:

"The scope and extent of a release depend as a rule upon the interest (intent) of the parties as expressed in the terms of the particular instrument. Parol evidence is inadmissible to prove that claims not included in the writing were understood at the time of the executing of the release to be embraced in the transaction. Parol evidence cannot be offered to vary the docu-

ment (*St. Louis & S. F. Ry. Co.* v. *Dearborn Co.*, 60 Fed., 880; *Holbrook* v. *Sperling*, 239 Fed. Rep., 715). Parol evidence is admissible where, while not changing the nature of the contract, it shows the reason for the execution of the release and points out its use and application. But a valid release as conclusively estops the parties from reviving and litigating the claim released as a final act and it forever extinguishes a personal right of action. It completely discharges and extinguishes all rights and claims of the releasor against the releasee which are included in the release and this is true even though the releasee fails fully to perform a promise which was the consideration for the release unless the operation of the release was based upon full performance. Even if invalid, it is binding upon the parties until attacked in a proper manner and set aside. * * * A release like every other contractual obligation has for its primary rule of construction the intention of the parties. This must govern. This intention, however, must be clear from the words used in the instrument and not from matters *de hors* the writing (*Hoes* v. *Van Hoesen*, 1 Barb. Chan. N. Y., 379 *Sherburne* v. *Goodwin*, 44 N. H., 271). The release here does not contain any limitation which would indicate an intent at the time of its

> execution of a conditional delivery so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation and thus defeat the claims of other creditors."

Thus while expressly admitting that parol evidence is admissible to show the *purpose* and *condition* of the delivery of an instrument, and that every contractual obligation has for its primary rule of construction the intention of the parties, the majority opinion holds that such rule is not applicable to a release, and that in order to limit its effect to the *purpose* for and the *condition* on which it was given such limitation must appear by the terms of the instrument itself and may not be established from matters *de hors* the writing.

The majority opinion, it is submitted, is in direct conflict with the rule laid down in many authorities by this Court and of universal application that, in the absence of estoppel, parol evidence *de hors* the writing is admissible for the purpose of showing the *purpose* of the execution of the writing and the effect which by the agreement of the parties is to be given thereto.

The majority opinion is also in direct conflict with the decision by the Court of Appeals of the State of New York in *Sterling* vs. *Chapin*, 185 N. Y., 395, expressly holding that a release executed for the limited purpose of complying

with the rules of the New York Stock Exchange and not with the intention of cancelling the indebtedness, would not bar recovery for the amount advanced for the purchase price of the seat by the releasor.

By the decision in the present proceeding, therefore, a direct conflict is created and will exist between the decision by the highest court of the State of New York and the decision by the Circuit Court of Appeals for the Second Circuit sitting in that State, as to the effect to be given to a release executed for the purpose only of complying with the rules of the New York Stock Exchange and with no intention as between the parties themselves of releasing the indebtedness except as to creditor members of the Exchange; and in any proceeding brought in the State Court a release given for such a purpose will be held to have an entirely different effect from that of the same or other release of like nature in a proceeding brought in the Federal Courts sitting in that State.

The membership of the New York Stock Exchange is 1100 members, four-fifths of whom execute releases under the requirements of the rules of the Exchange at the time of the purchase of their seats of similar character and import to those in the present proceedings, and questions as to the rights of creditors, not members of the Exchange, are constantly arising by reason of members of the Exchange becoming insolvent, and numberless proceedings will in the

future, as in the past be brought both in the State Courts and the Federal Courts, in insolvency and bankruptcy proceedings to establish the claims of creditors not members of the Exchange in the assets of an insolvent member. This application, therefore, is not predicated only upon the rights of the individual petitioner but is based upon the obvious necessity of resolving the conflict between the decision of the highest court of the State of New York and the decision in this proceeding as to the rights of non-member creditors in the assets of an insolvent member of the New York Stock Exchange where a release has been given under the circumstances shown in the present proceeding, and to the end that such conflict be settled, it is necessary that the decision below should be corrected by this Court.

WHEREFORE your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari directed to the United States Circuit of Appeals for the Second Circuit requiring that court to certify a full and complete transcript of record in the above entitled cause to this Honorable Court for its review and determination.

FRANK B. LOWN,
Solicitor for Petitioner.

VERIFICATION:

State of New York, } ss.:
County of Dutchess, }

FRANK B. LOWN, being duly sworn, says: That he is the solicitor for the petitioner, Edward S. Atwater, herein, and that the allegations of said petition are true as he is informed and verily believes.

FRANK B. LOWN.

Sworn to before me this
10th day of August, 1920.
JOHN B. GRUBB,
Notary Public.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for the petitioner herein, Edward S. Atwater; that the allegations of fact contained in said petition are true and that said petition in our opinion is well founded in law as well as fact.

ABRAM J. ROSE,
FRANK B. LOWN,
Counsel for Petitioner.

BRIEF OF ARGUMENT.

The decision of the United States Circuit Court of Appeals for the Second Circuit should be reviewed by this Court because,

FIRST: The majority decision, in violation of the Bankruptcy Act, 1898, Sec. 5, Clause F, denies to the petitioner, as an individual creditor of Eliot Atwater, a member of the bankrupt firm, priority in payment of his debt out of the individual assets of Eliot Atwater over claims of partnership creditors.

SECOND: The majority decision is in conflict with the rule of evidence announced by this Court and other Federal and State Courts, that in the case of any instrument, in the absence of an estoppel, it is always competent to show that it was not delivered, or that the delivery was upon certain conditions, or for a particular purpose.

THIRD: The majority decision creates a direct conflict with the decision by the highest Court of the State of New York in *Sterling* v. *Chapin*, 185 N. Y., 395, as to the effect of a general release given simply for the purpose of complying with the requirements of the rules and regulations of the New York Stock Exchange, and without an intention as between the parties to

the instrument of discharging the indebtedness, except as to creditor members of the Exchange.

FOURTH: The majority decision is also in conflict with the rule of evidence that in a suit between a party and a stranger, neither is concluded by the writing, but either may give evidence differing from it.

FIFTH: The majority decision also involves a misconstruction of the rule of evidence that where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties the instrument will be corrected so as to make it conform to their real intent.

SIXTH: The majority decision will in its effect create great confusion and inequality in the State of New York among creditors of insolvent Stock Exchange members, which dangerous and inequitable situation calls for a decision by this Court harmonizing the rule in the Federal courts sitting in the State of New York with that in the State courts.

BRIEF.

I.

The petitioner as an individual creditor of Eliot Atwater is (if his claim is not barred by the releases in question) entitled to priority in payment of his debt out of the individual assets of Eliot Atwater over claims of partnership creditors of Atwater, Foote & Sherrill.

Bankruptcy Act 1898, Section 5, Clause F;
Farmers & Mechanics National Bank v. *Ridge Avenue Bank*, 240 U. S., 498;
In re: *Wilcox*, 94 Fed. Rep., 84.

Unless therefore the petitioner's claim is barred by the releases given by him to his son, it should have been allowed to be proved and the court below erred in rejecting and expunging it.

II.

The majority opinion wholly ignores and overlooks the fact that by the express agreement and understanding between the petitioner and his son to whom he advanced the money for the purchase of the seat, the releases were executed wholly and solely for the purpose of complying with the rules and regulations of the Exchange

and for no other purpose, and that *as between themselves the indebtedness would still exist* (Record, pp. 30-31, fols. 89-91; p. 29, fol. 86).

That this was the understanding of the parties is wholly undisputed. The proof, therefore, is that the release was given for a limited purpose only and on the condition that they should not discharge the debt, except as to creditor members of the Exchange.

Under such circumstances the release should have been limited to that purpose and given no greater effect.

In the case of any instrument in the absence of an estoppel, it is always competent to show that it was not delivered, or that the delivery was upon certain conditions or for a particular purpose.

Peugh v. *Davis*, 96 U. S., 332;
Brick v. *Brick*, 98 U. S., 514;
Jackson v. *Lawrence*, 117 U. S., 679;
Cabrera v. *American Colonial Bank*, 214 U. S., 224;
Valdes v. *Central Altagracia*, 225 U. S., 58;
Ducie v. *Ford*, 138 U. S., 587;
Western Underwriting & Mortgage Co. v. *Valley Bank of Phoenix*, 237 Fed. Rep., 45;
Lumley v. *Wabash Railroad Co.*, 76 Fed. Rep., 66.

To the same effect are the decisions by the highest court in the State of New York:

Herrick v. *Carman*, 10 Johnson, 224;
Grierson v. *Mason*, 60 N. Y., 394;
Matthews v. *Sheehan*, 69 N. Y., 585;
Juilliard v. *Chaffee*, 92 N. Y. 529;
Marsh v. *McNair*, 99 N. Y., 174;
Schmittler v. *Simon*, 114 N. Y., 176;
Ensign v. *Ensign*, 120 N. Y., 655;
Thomas v. *Scutt*, 127 N. Y., 133;
Blewitt v. *Boorum*, 142 N. Y., 357;
Baird v. *Baird*, 145 N. Y., 659;
Higgins v. *Ridgway*, 153 N. Y., 130;
Sterling v. *Chapin*, 185 N. Y., 398.
Grannis v. *Stevens*, 216 N. Y., 583.

In *Peugh* v. *Davis*, *supra*, this court had before it a deed absolute in form but claimed to have been executed as security for a loan of money. It was held that evidence *de hors* the writing was admissible to show the real purpose of the transaction.

In *Brick* v. *Brick*, *supra*, the rule in *Peugh* v. *Davis* was followed with respect to a pledge of a certificate of stock as security for a loan of money.

In *Cabrera* v. *American Colonial Bank*, *supra*, in which it was claimed that a bill of sale was an absolute conveyance and accomplished the payment of debts to a bank, this court said:

"The face of an instrument is not always

> conclusive of its purpose. In equity extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstances of the parties and executes their real intention and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be proved."

In *Grierson* v. *Mason, supra,* the plaintiff tried to prove that his commissions were to amount to at least $1500 a year. The defendant offered in evidence an agreement between the parties limiting these commissions to five per cent. The plaintiff was permitted to prove that the *purpose* for which this agreement was executed was not to limit the amount but to induce one Woods to advance money upon the goods. The Court of Appeals of New York said:

> "Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony but tends to explain the circumstances under which such an instrument was executed and delivered or to show that it was cancelled or surrendered."

Such a rule obviously is necessary to prevent fraud.

The majority opinion in the court below, it is submitted, is in direct conflict with the salutary rule laid down in the cases referred to and the true rule is stated in the minority opinion to the effect that the petitioner and his son "could have agreed that the release though general was made for the benefit of the Stock Exchange creditors only and that the transaction was as between themselves a loan by the father of the price of the seat to the son" and that in the absence of evidence showing "that any creditor of the bankrupt firm or of Ekot Atwater individually did so rely or even know of the existence of the release * * * there can be no estoppel in favor of the trustee in bankruptcy representing the creditors in general." (Opinion, WARD, CIRCUIT JUDGE, Record, p. 126, fol. 378.)

III.

The majority opinion also is in direct conflict with the decision by the highest court of the State of New York in *Sterling* v. *Chapin*, 185 N. Y. 395.

In *Sterling* v. *Chapin*, the testator advanced money to his brother, the defendant (they being partners in a stock brokerage business) for the purchase of a seat in the New York Stock Exchange. The testator executed a release in which he released his brother, the defendant, from all claims and demands which he had by reason of the advance, which release was

delivered to the authorities of the Stock Ex
change at the time of the purchase of the sea
by the defendant. The evidence showed tha
notwithstanding the giving of the release th
parties always considered as between themselve
that the indebtedness existed.

Holding that the release was not a bar to
recovery by the executor of the testator of th
monies advanced, it was said by the learne
Judge writing for the NEW YORK COURT OF A
PEALS:

> "I have already referred to the rule
> the Stock Exchange which required an a
> surance that a proposed member was fr
> from indebtedness as a protection to t
> members against any claim which any pe
> son might have for monies advanced for t
> purchase of his seat. The defendant w
> about to become such member. The testat
> whether he did it as an individual or
> means of the co-partnership capital whi
> he had solely furnished, advanced the mo
> ey for the purchase of the seat. He ex
> cuted the instrument in question which
> between him and the Stock Exchange wou
> have operated to prevent any claim for th
> advance in which ever form made. * * *
> do not think we are thus compelled
> (*i. e.*, to permit the discharge of the exi
> ing debt simply by virtue of the releas
> but that in the manner indicated such eff
> may be given to both the release and t

entries upon the books as will accomplish the true intent and understanding of the parties."

The majority opinion sought to distinguish the case cited from the present case on the ground that in the former no rights of creditors arose and that the release was delivered to the Stock Exchange and not to the borrower of the money. It is submitted the decision cited is not distinguishable on these grounds. In the present case it was not shown, and this fact is expressly stated in the minority opinion of the CIRCUIT JUDGE WARD, that any creditor of the firm or of Eliot Atwater individually relied on the release or even knew of its existence and for that reason there could be no estoppel in favor of the trustees in bankruptcy representing the creditors in general. (Opinion, WARD, CIRCUIT JUDGE, Record, p. 126, fol. 378). The creditors therefore could have no greater rights than the debtor himself, and if as to him the release was not effective (except as to creditors members of the Exchange) to discharge his indebtedness to his father, it could not be availed of by the general creditors. Nor, it is submitted, does it make any difference whatsoever that the release was delivered to Eliot Atwater and by him delivered to the Stock Exchange instead of a direct delivery to the Exchange as was made in the case cited. The *purpose* for and the condition on which the releases were given determine their effect and not the mere manual agency through which the delivery was made.

IV.

The Trustees representing the general creditors are third parties to the releases, in the sense in which the term is used in the rule that in a suit between a party and a stranger neither is concluded by the writing but either may give evidence differing from it.

Valdes v. *Central Altagracia*, 225 U. S., 58, at page 75;
O'Shea v. *New York C. & St. L. Ry. Co.*, 105 Fed. Rep., 559.

V.

Both parties to the releases, according to the undisputed proof, intended and understood that they were limited in their purpose and effect to creditor members of the Exchange, and that the indebtedness still existed as to all other persons, and if the releases as drawn extinguished and cancelled the indebtedness as to general creditors, they were entered into by mutual mistake, which fact extrinsic evidence was permissible to prove because the writing did not express the actual agreement of the parties.

Hearne v. *N. E. Mutual Marine Ins. Co.*, 87 U. S., 488;
Equitable Safety Ins. Co. v. *Hearne*, 87 U. S., 494;

Snell v. *Atlantic F. & M. Ins. Co.*, 98 U. S., 85;
Griswold v. *Hazard*, 141 U. S., 260;
Walden v. *Skinner*, 101 U. S., 577;
Thompson v. *Phenix Ins. Co.*, 136 U. S., 287.

VI.

The effect of the majority decision will be to create great confusion and inequality in the State of New York among creditors of insolvent Stock Exchange Members.

The membership of the Exchange is 1100 members, four-fifths of whom have executed releases of similar import to the one in suit.

In proceedings brought in the State courts of New York against an insolvent member, under the decision by the Court of Appeals in *Sterling* v. *Chapin* (*supra*) the effect of these releases though general in form may be limited to and availed of only by creditors, members of the Exchange, while in a proceeding in the Federal courts sitting in that State, under the decision by the Court below they may be availed of by general creditors not members of the Exchange to bar the proof of a debt never intended by the parties to the releases to have been included in it.

Moreover, while under the State court decision an individual creditor, in accordance with the provisions of the Bankruptcy Act, Section

5, Clause F, may prove his debt and secure priority in payment thereof out of the individual assets of a member of an insolvent firm over claims of partnership creditors, under the decision by the Court below, an individual creditor will be barred from proving his debt, and thereby the provisions of the Bankruptcy Act will be defeated.

Thus, under the decision by the Court below firm creditors, non-members of the New York Stock Exchange, will have greater rights, and indivdual creditors will have less rights in the assets of an insolvent Stock Exchange firm and the members thereof, than non-member creditors pursuing their remedies in the State courts.

This dangerous and altogether inequitable situation, it is submitted, calls for a decision by this Court harmonizing the rule in the bankruptcy and other Federal courts with that in the State courts of New York, and to that end the review of the decision below by this Court for the purpose of correcting the error in such decision is necessary and indispensable.

VII.

The petition should be granted and a writ of certiorari issued as prayed.

Abram J. Rose,
Frank B. Lown,
Counsel for Petitioner.

CASES CITED.

United States Supreme Court

In the Matter *of* Morton Atwater, Eliot Atwater, Gilbert F. Foote, and Harold W. Sherrill, individually and as co-partners doing business as Atwater, Foote & Sherrill, Bankrupts, Edward S. Atwater, Petitioner.	Respondents' Brief

Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, as trustees in bankruptcy for all the above named bankrupts respectfully make and file this brief as the respondents herein.

FACTS

The petitioner Edward S. Atwater filed a claim against the individual estate of Eliot Atwater for $75,000, money advanced by him to his son, the said Eliot Atwater, to be used in the purchase of a seat in the New York Stock Exchange. The trustees in bankruptcy objected to the allowance of the claim and moved to expunge the same. The matter was referred to a Special Master, who made a report establishing the facts and holding as a conclusion of law that the petitioner was by reason of the execution of certain releases, barred and estopped from asserting his claim and that the petition

of the trustees to reject and expunge such claims should be granted. An order was made by Mayer, Judge of the United States District Court, for the Southern District of New York, confirming the Special Master's report and ordering that the proof of claim, filed by the petitioner against the individual estate of Eliot Atwater, be expunged and dis-allowed. An appeal was taken from the order of said United States District Court to the United States Circuit Court of Appeals for the Second Circuit and the decision was rendered by that Court sustaining the order of the United States District Court.

The individuals composing the bankrupt firm entered into an agreement on June 1, 1912, whereby they formed a partnership under the firm name and style of Atwater, Foote & Sherrill. See Claimant's Exhibit 1, Page 74 of Record.

Under this agreement Eliot Atwater was to put in the use of his membership on the New York Stock Exchange and every six months there was to be paid to him "such an amount as shall pay interest for six months at the rate of six per cent. per annum on $75,000," being the purchase price and initiation fee of his membership on the New York Stock Exchange. Apparently contemporaneously with the signing of the co-partnership agreement, to wit, May 1, 1912, at any rate, on that day, Edward S. Atwater, the petitioner, executed and delivered to Eliot Atwater two releases—trustees' exhibits A and B, (Page 70 and 72 of Record).

The questions therefore presented to the Special Master were:

A. Did the purchase of the Stock Exchange Seat at the time of its purchase or at any time afterward become the asset and property of the firm?

B. Or whether it upon such purchase and ever afterward remained the individual property of Eliot Atwater.

C. If it remained the property of Eliot Atwater is the petitioner entitled to enforce his claim against his son's assets or is he barred by reason of the execution of the releases before referred to?

The Special Master held that the seat was the individual property of Eliot Atwater:

First: That Eliot Atwater became the individual owner of the seat in the New York Stock Exchange on May 16, 1912, and was such individual owner at the time of the filing of the petition in bankruptcy. Record, Page 87.

Second: The said seat was never the property of the firm of Atwater, Foote & Sherrill.

Third: That by the execution and delivery to said Eliot Atwater by Edward S. Atwater, the petitioner, of the releases, trustees' exhibits A and B as shown in the record, the said Edward S. Atwater was barred and estopped from asserting a claim to the profits of said seat or as an individual creditor of said Eliot Atwater for the moneys advanced toward the purchase price thereof and for initiation fees in said exchange has received precedence

in bankruptcy action of the general creditors of the firm of Atwater, Foote & Sherrill.

The U. S. District Court on the 14th day of January, 1920, confirmed the Special Master's report and expunged and disallowed the claim of said Edward S. Atwater against his son, Eliot Atwater, Page 102 of Record, and on the first day of June, 1920, a decree was made by the Circuit Court of Appeals for the Second Circuit affirming a decree in the United States District Court and the petitioner herein now seeks to have the decision of the Circuit Court reviewed and the sole question to be considered by this court is whether parole evidence was competent to vary or explain the terms of the original release as against the trustees and whether the releases as evidence are not a bar to petitioner's right to establish his claim against said Eliot Atwater. There are no creditors of the firm of Atwater, Foote & Sherrill members of the New York Stock Exchange and no claim has been filed with the trustees by any creditors who are members of such Exchange.

POINT I.

STOCK EXCHANGE SEAT BELONGS TO ELIOT ATWATER.

All the facts connected with the purchase of the seat, obtaining of moneys to be paid for the same, the purpose and object of the purchase, the dealings of the firm with relation to the seat are conceded, and offer no ground for dispute. The parties themselves interpreted the release between

themselves when contributing to the assets of the firm at its creation Eliot Atwater's contribution being "the use of his membership in the New York Stock Exchange" and they further provided that each six months there should be paid to him "interest at the rate of six per cent. on $75,000" being the purchase and initiation fee of his membership in the New York Stock Exchange. The testimony shows that such interest was paid by the firm, therefore, to Eliot Atwater or his father upon the said $75,000. No change was made by the articles of co-partnership affecting or relating to the $75,000 except the firm was to pay interest only on the average selling price of a seat during the preceding six months. The testimony shows that after the new arrangement the amount paid by the firm did not equal six per cent. upon $75,000 to Eliot Atwater. Record, Page 57.

It is difficult to understand how on the foregoing conceded facts any controversy can have arisen as to the ownership of the seat in question. The fact of the ownership by the said Eliot Atwater of the seat in the Stock Exchange is established by the Special Master's report, order of confirmation and decision of the Circuit Court of Appeals.

POINT II.

THE PETITIONER IS ESTOPPED FROM ASSERTING HIS ALLEGED CLAIM AS AGAINST THE FIRM OR INDIVIDUAL CREDITORS.

Estoppel by releases under seal.

An examination of the releases which are under seal and appear in Pages 70, 71, and 72 of the Rec-

ord shows that they not only released Eliot Atwater from all claims and demands, but especially by reason of the advance of $75,000 by the father, the petitioner, to enable him to buy a seat and to pay his initiation fee in the Stock Exchange. These releases are still in force and have never been surrendered or cancelled. They were delivered by the father to his son, Eliot Atwater, who in turn delivered them to the New York Stock Exchange. Record, Page 4.

After their delivery to the son, by him to Stock Exchange, there was no liability of any kind on the part of Eliot Atwater to repay such sum to his father, Edward S. Atwater, the petitioner. There does not appear in the Record any evidence of any revival of the debt after the delivery of the releases nor is there any proof of any promise to pay the money or revive the debt. On the contrary testimony of Eliot Atwater on this subject given before the referee is as follows:

"Q. I read from the minutes at the adjourned first meeting of creditors taken before Harry Arnold, Esq., Referee, under date of June 22, 1918, at page 784:

'Q. Did your father Edward S. Atwater sign that release? A. He did.

Q. Stating to the Exchange and to the Secretary that there was no claim whatsoever upon that seat? A. That's right.

Q. And that the Seat was a gift to you? A. I am merely stating my recollection.

Q. Was the paper in writing that you produced? A. Yes, sir, what I saw in 1912 and am stating my best recollection.

Q. It was your understanding at the time and has been since that the papers executed by your father and the conditions under which the purchase of this Seat was made had to be an absolute gift in order for you to own that Seat? A. I understood it had to be released on his part of all claim.

Q. And that he had no claim against you personally for it, is that correct? A. I considered he had a moral claim against me for it.

Q. You owed a moral obligation to him? A. Yes, sir.'

Q. Do you recall so testifying? A. If you read it I will agree that I testified to it.

Q. I am reading from page 785 of the same testimony:

> 'Q. So far as the deal itself was concerned, from your talks with your father and from the papers you understood had to be signed, it was a gift to you? A. I have no talks with my father, but I understood from the paper that there was no claim against me legally by him.'

Q. Do you recall so testifying? A. If it is in there, I testified to it.

Q. Was the testimony I have read to you true, and the answers you made true? A. Yes, sir, as to my conception of it at that time.

Q. I am reading from page 795 of the same testimony:

"Q. Did you ever acknowledge any moral obligation? A. No, sir."

Q. Do you recall so testifying? A. I don't know what it applies to. If it is in there as my testimony, I said so."

It will be noticed that in the foregoing testimony Eliot Atwater states that he owed a moral obligation to his father, but, at folio 146, he testified as follows:

"Q. Did you ever acknowledge any moral obligation? A. No, sir."

We call attention to Eliot Atwater's understanding to the effect of the release, although the release speaks for itself. In his testimony, at folios 141 to 145 he states, "I understood from the paper that there was no claim against me legally by him."

Edward S. Atwater, the petitioner, further testified (fols. 111 and 112) that the subject of this advance of $75,000 for the purchase of the seat was never discussed between him and his son after he had advanced the money, *and that he does not remember that his son ever agreed to repay the money to him*, and, at folio 119, he testifies that his son never made any statement to him relative to the money or made any agreement with him for the repayment of the money and that he had no memorandum or promise.

The testimony which is quoted above was given by Eliot and Edward S. Atwater shortly after the filing of the petition in bankruptcy at the hearing at the first meeting of creditors.

It is thus entirely clear from the testimony of the bankrupt and his father that the original debt was released, and that there was no legal or moral obligation to repay the money.

It has been claimed by the counsel for the appellant in his brief that the payment of the interest to the father by the son, and afterwards by the firm to the son, shows an intent to revive the obligation, notwithstanding the absolute release thereof in writing and under seal.

We respectfully submit that, in view of the testimony, the payment of this interest does not in any way prove the existence of a debt from the son to the father, even between themselves, and certainly not as against creditors.

It must be noted that in the first partnership agreement it was provided between the partners that interest should be paid to Eliot Atwater at the rate of 6 per cent. upon the $75,000, the purchase price and initiation fee of his membership on the New York Stock Exchange, and that in the second agreement interest was paid to Morton Atwater on the amount of capital furnished by him, and also the same provision was contained in reference to the payment of interest to Eliot Atwater upon the value of his New York Stock Exchange seat, and interest was also agreed to be paid to Gilbert F. Foote upon the value of his Cotton Ex-

change seat. *What arrangement there was between Eliot Atwater and his father which induced him to hand over the interest received by him from the firm does not appear, and in the face of the positive evidence shown by the releases that no debt was existing and the absence of any proof reviving the debt as a legal or moral obligation, the mere payment of interest by the son to the father, or afterwards directly to the father by the firm during the absence of his son, created no legal or moral liability for the repayment of the principal*, and the fact that the interest was so paid has no probative force in this proceeding to establish any debt in favor of the appellant.

No legal liability having been established, the question arises, could there be any moral liability which would enable the petitioner, Edward S. Atwater, to enforce his claim against his son in bankruptcy? It must be remembered that even if there were any moral obligation, it could only be used in certain cases as a consideration for a new promise to pay the debt after the giving of the releases.

Assuming, for the sake of argument, that an inference might be drawn from any testimony, facts or circumstances presented in the record, of a promise to repay this money, there would be no consideration to support it, and it would not revive the debt, because it has been well settled by authority that where a person voluntarily releases a debt due him no moral obligation upon the part of the debtor survives which would furnish an adequate consideration for a subsequent promise to pay. It is only where the creditor is forced by in-

voluntary proceedings to release his debt that there remains the moral obligation which would furnish a consideration for a promise to repay it.

(See *Taylor v. Hotchkiss* and cases cited, 81 App. Div., p. 470, at pp. 475-476; affirmed in Court of Appeals, 179 N. Y. 546.)

It thus appears that any debt existing in favor of the father against the son was absolutely extinguished by the releases and was never revived.

Counsel for appellant ingeniously argues in his brief that the effect of these releases could only be invoked by creditors who were members of the Stock Exchange, and that other creditors cannot take advantage of it. *It is urged on behalf of the trustees that this release was effective not only in so far as it related to the members of the Stock Exchange, but was* also in favor of all persons who had dealings with the firm of Atwater, Foote & Sherrill and became creditors of such firm or of Eliot Atwater. While as between the parties Eliot and the petitioner, Edward S. Atwater, some such arrangement might have been made, this Court, under the circumstances and in view of the facts hereinafter shown that the firm advertised that they were members of the New York Stock Exchange, will not permit Edward S. Atwater to now re-assert his claim either as against the creditors of Eliot Atwater or creditors of the firm.

This Court will not lend its aid in the enforcement of such an alleged obligation, as the appellant now asserts, after his conclusive release of

any debt he had, by written releases, under seal and his acts tending to deceive the firm creditors as well as the Exchange.

The claimant does not come into this Court with clean hands. On the contrary, he wishes the aid of the Court in helping him to perpetrate a fraud. He admits that his son could not purchase a seat on the Exchange unless the obligation to repay the money loaned to him for the purchase of the seat was expressly released in writing, and also that his son had to make a statement that he was the sole owner of the seat on the Stock Exchange without any encumbrance. (Fol. 98; see also fol. 100).

Having released his claim and allowed his son to make the above statement, the obligation of his son to him was extinguished absolutely. While it may be true that the main purpose of the rules of the Exchange in requiring a person who loans money to another wishing to purchase a seat on the Exchange is to protect its own members, the release does not contain a limitation of this kind, and such limitation cannot be read into it now for the purpose of defeating the claims of other creditors.

A simlar question was passed upon by the Court, Southern District of New York in Matter *of J. M. Fisk & Co.*, decided by Seaman Miller, Esq., Referee, under date of July 12, 1912, whose findings were confirmed without opinion by a former Judge of the United States District Court, Hon. George C. Holt.

In that case, Eugene R. Washburn, the father, made a claim for $85,500 advanced to his son for

the purchase price of a seat on the Stock Exchange. Releases exactly like the ones in this case were given by the son to the father, and simultaneously with the execution of the release, the son gave the father his promissory note, promising to pay the sum of $85,500. The Referee said:

> *"In my opinion, the note in no way affected adversely the creditors of J. M. Fiske & Co., as the father had by the foregoing instrument in writing released the whole world from the payment of the sum involved in the original transaction whereby the Stock Exchange seat was purchased."*

That case was much stronger than the case at bar, for in the former there was an actual written promise to pay the released indebtedness. The Court expunged the claim both against the firm and against the individual partner.

The petitioner urges in his brief that his claim should be allowed under the authority in *Sterling v. Chapin*, 185 N. Y., 395. A careful reading of this case will enable this Court to note the distinction between it and the case at bar.

Sterling v. Chapin (*supra*) was an action for a co-partnership accounting between two brothers—the plaintiff's testator and the defendant. No question arose in that case as to the rights of creditors of the firm. The question decided was merely as to the rights between the partners, one of whom, the deceased partner, had advanced all the money for the purchase of the seat. While the deceased partner had given a release to the Exchange sim-

ilar to the one in the case at bar, there was not any evidence that was ever delivered to or even seen or heard of by the defendant. An account was opened in the books of the co-partnership several days after the execution of the release and was carried on such books at the time of its dissolution, and in that account the defendant each year exclusive of the one ending when the co-partnership was dissolved, was charged with interest upon the balance shown to be due from him, and was credited with various payments—the balance at the date of its dissolution due from him being $37,708.80. In addition to which the defendant more than two and one-half years after the execution of the release wrote to his brother a letter which acknowledged his indebtedness to him of the amount so charged against him. The Court of Appeals in making its decision said, at page 402:

> "Many days after the release was executed the defendant charged himself upon the co-partnership books with cash advanced for his seat. These entries mean that on that day the firm advanced said money, and first became his creditor upon the transaction in question."

The Court continuing said (p. 403):

> "What I emphasize is, that we have here an uncontradicted and unexplained admission of the defendant, by entries which are binding upon him, that upon a certain date the co-partnership advanced money to or for him, and that this co-partnership indebtedness was not affected by a prior individual release of one co-partner."

Attention is again called to the fact that no rights of creditors were in any way affected, and that the testator had supplied the entire co-partnership capital, out of which money was advanced for the purchase of the seat, and the Court said, at the foot of page 400:

> "If a co-partnership transaction, it would not have been strange or conclusive against plaintiff's claim, if in a release, not having that point in mind, he had definitely recited that the advance was made by himself; but this he did not do."

The Court further treated the moneys advanced for the purchase of the seat as a part of the capital of the firm and said (p. 401):

> "When we consider the facts that subsequently the parties by an account with items extending over seven or eight years expressly and continuously admitted that the co-partnership advanced money with which to purchase the seat, and that the defendant was indebted to such co-partnership for such advance, all uncertainty vanishes, and we have proof which is conclusive upon this appeal that the matter was a co-partnership and not an individual transaction."

Estoppel by reason of other acts.

An examination of the record discloses that from the inception of this firm down to the filing of the petition in bankruptcy it advertised extensively in

newspapers in the City of Poughkeepsie as "Members of the New York Stock Exchange," and all of their stationery, including their checks, bore this statement, and this fact was also prominently lettered on the windows of their offices.

That the firm was so advertising and holding out to the world that they were "Members of the New York Stock Exchange" was well known by Edward S. Atwater, the petitioner herein. (Fols. 127-129).

The words "Members of the New York Stock Exchange" certainly conveyed to the public the impression that the firm owned the seat and was a representation that it was a part of the firm assets.

Having acquiesced in the representations as to the ownership of a seat, and having absolutely released all claims against his son, the petitioner is estopped from asserting his claim as against creditors who relied on the fact that the firm was the owner of this seat, and the Court must at least hold that the petitioner's rights are subordinated to the claims of creditors who traded with this firm on the strength of the fact that it was, or one of its members was, the owner of the Stock Exchange seat.

The release was executed and delivered to Eliot Atwater for the purpose of showing to the Exchange that Eliot Atwater was freed from any indebtedness by reason of the loan, and thus made him solvent and able to perform financially his obligations. It cannot be now claimed that in fact the indebtedness was not discharged and that simultaneously with the execution of the release, or at

the time the loan was arranged, Eliot Atwater agreed to repay the same. If this were so the effect was to deceive the Exchange and the customers of the firm who dealt with it in reliance on the fact that the firm owned the seat.

The Court will not lend its aid in the enforcement of a contract the result of which was to deceive the customers of the firm.

POINT III.

WITH RESPECT TO THE CREDITS OF THE FIRM, THE RESPONDENTS' CONTENTION IS, THAT THE NEW YORK STOCK EXCHANGE SEAT WAS A CO-PARTNERSHIP ASSET.

An examination of the testimony shows that it was a contribution to the capital of the firm by Eliot Atwater. This was admitted by the appellant at folio 103 of the record, where, in answer to a question as to whether the seat was one source of the capital that the firm of Atwater, Foote & Sherrill were to have, he replied, "Yes, sir, that was it," and at folios 139 to 141, Eliot Atwater, after stating that there was no obligation to his father at the time the seat was bought, stated, at folio 141, that the seat was his contribution to the firm assets and his reason for getting in the firm.

Harold Sherrill, at folios 181 to 184, testified that Morton Atwater's contribution of the capital of the firm was to be $50,000, and Eliot Atwater's contribution was that he contributed the seat.

It is now argued on behalf of the petitioner that the co-partnership agreement indicates that the seat was not a contribution to the firm, but that its use was merely given to the firm. It will be noted that the same thing might be said of the $50,000 working capital which Morton Atwater contributed, because, taking the language of the agreement, it is stated that "Morton Atwater furnishes to the partnership the loan of $50,000 working capital" and that Eliot Atwater furnishes "the use of his membership on the Stock Exchange." Both these contributions, it will be noted by the agreement, were contributions to the *capital* of the firm, and the fact that in one case where the money was contributed it is stated to be a loan to the firm, and in the other case where the seat is contributed it is stated to be the use of the seat, does not alter the fact that both made up the capital of the firm, and Morton Atwater could not appear as a creditor until other creditors were fully paid, nor could Eliot Atwater claim his seat until creditors were fully paid.

The Court must determine the question as to whether the seat was a co-partnership asset, not only from the testimony of the parties themselves above referred to, but also in the light of all circumstances surrounding the purchase and use of the seat by a co-partnership of stock brokers.

Under the rules of the Stock Exchange the firm as such cannot have a seat in its name. It is always placed in the name of one of the partners, even although the firm may contribute the money for its purchase. It is for this reason that the seat

when purchased is placed in the name of a member of the firm. In fact, the appellant took part in the negotiations which led to the formation of this firm and testified (fols. 96 and 97) that there was talk about financing it, and as to whether they would need any capital, and the first talk that he had was, that he would furnish the means to buy a seat on the New York Stock Exchange, and that that was not enough, because Foote & Sherrill (the established firm into which the Atwaters were entering) felt as well as the Atwaters themselves, that they needed more money to do the business and the appellant said he was ready to contribute more. Whatever he contributed was put in by his son Morton Atwater as part of the capital of the firm.

It is perfectly clear that, inasmuch as under the rules of the Exchange the legal title to the seat had to be in the name of some individual member of the firm, and as it was a contribution to the *capital* of the firm by Eliot Atwater, it had to remain in his name. By reason of said rules it was necessary in preparing the co-partnership papers to so word the agreement as not to violate the rules.

All contributions to the capital of a firm are for the use of the firm. On dissolution such capital (if the firm is solvent) is returned to the respective contributors. When Eliot Atwater contributed the use of his seat on the Exchange, he contributed the seat itself as a part of his capital.

Attention is also called to the fact that objection was made to the parole evidence introduced by the

petitioner which tended to contradict the effect of the sealed releases. We think this objection was perfectly valid, inasmuch as the trustees was a privy of one of the parties to the release, to wit: Eliot Atwater. The rule is too well settled to require argument that parole evidence cannot be used to controvert or vary a written instrument in an action or proceeding as against the parties to the instrument or their privies.

POINT IV.

THE AUTHORITIES CITED BY THE PETITIONER DO NOT SUSTAIN HIS CONTENTION AS TO THE EFFECT OF THE RELEASE.

The petitioner seeks to evade the effect of the estoppel created by the acts of his son and himself by now claiming that he can assert his claim against his son after rights of creditors have intervened, and the decisions cited by him on Page 24 of his brief attached to the moving papers on this application are only authority that in certain cases the conditions connected with the execution of a paper may be shown. But they cannot be considered to mean that the legal effect of an instrument may be altered by parole evidence long after the real transaction, when its effect will be to deprive creditors of their security.

Circuit Judge Manton in writing the prevailing opinion herein says:

> "The release here does not contain any limitation which would indicate an intent at the

time of its execution, of a conditional delivery so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation and thus defeat the claims of other creditors. The appellant was an attorney at law, although not actually engaged in practice. He had full opportunity to read and understand the force and effect of the document he executed. He released the whole world from payment of the sum involved. He represented not only to the Stock Exchange members, but to everyone that so far as he was concerned, his son owed him nothing for the Stock Exchange membership. Nor can we support the claim of the appellant, because he received interest on the loan of Seventy-five Thousand Dollars from his son against this sealed and solemn instrument of release. We think he is estopped from asserting his claim."

The only case cited by the petitioner which is at all applicable to the facts of this case is Sterling vs. Chapin (185 N. Y. 395) which we have already distinguished. Judge Manton says of that case that the action there was for an accounting between the parties.

The brief of the petitioner is based upon the assumption that the parties intended the release to be operative only so far as the Stock Exchange seat was concerned. We challenge this assumption and say it was only after the bankruptcy that the petitioner conceived that idea. Eliot Atwater says at folios 141-147 of Record:

"I understood from the papers there was no claim against me legally by him."

Edward S. Atwater, the petitioner, says at folio 119 of Record, his son never made any statement to him relative to the money or made any agreement with him for the repayment of the same and that he had no memorandum or promise.

In view of the testimony just quoted how can it now be claimed that the intention of the parties was to preserve the debt, and that therefore it can be claimed a limited effect of the release should re-create the debt as against creditors, which was created without any reservations whatsoever in the releases or between the parties?

POINT V.

THE PETITION SHOULD BE DISMISSED AND THE WRIT OF CERTIORARI PRAYED FOR SHOULD NOT BE GRANTED.

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No. 511

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1920.

EDWARD S. ATWATER,

Petitioner.

vs.

STEPHEN G. GUERNSEY, SAMUEL H. BROWN, AND CHARLES A. HOPKINS, Trustees in Bankruptcy of MORTON ATWATER, *et al., &c.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER.

ABRAM J. ROSS,
FRANK B. LOWE,
Counsel for Petitioner.

INDEX.

Cases Cited

SUPREME COURT OF THE UNITED STATES,

October Term, 1920.

EDWARD S. ATWATER, Petitioner, against STEPHEN G. GUERNSEY and others, Trustees in Bankruptcy of Morton Atwater, *et al.*, Respondents.	No. 511.

BRIEF FOR PETITIONER.

Statement.

THIS CASE COMES BEFORE THIS COURT ON CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The question of law to be reviewed by this Court, decided adversely by the Court below by a divided vote, is whether parol evidence was admissible to show the purpose for and the condition on which general releases under seal,

executed by the petitioner Edward S. Atwater to his son Eliot Atwater, of on advance to his son for the purchase of a seat on the New York Stock Exchange, in compliance with the rules and regulations of said Exchange, were given; which purpose and condition by the mutual agreement and understanding of the party was to protect creditor members of the Exchange only, and was not intended to be effective in favor of general creditors of the debtor. Such parol evidence, it is claimed, was permissible under well established rules laid down by this Court and other Federal Courts, as well as by the State Courts, and that the ruling below is in direct conflict with the decision by the New York Court of Appeals in *Sterling* v. *Chapin*, 185 N. Y., 395.

The judgment of the Circuit Court of Appeals sought to be reviewed herein was entered on the 1st day of June, 1920 (pp. 62-63), and affirmed by a divided vote an order and decree of the United States District Court, Southern District of New York, expunging the claim of Edward S. Atwater against the individual estate of Eliot Atwater, one of the members of the firm of Atwater, Foote & Sherrill, the above-named bankrupts, for the sum of Seventy-five Thousand Dollars ($75,000) monies advanced by the petitioner and used in the purchase of a seat for said Eliot Atwater on the New York Stock Exchange (pp. 51-52).

The trustees in bankruptcy of said firm objected to the allowance of the claim and moved

to expunge it, whereupon the matter was referred to a Special Master who made his report on the facts and held as a conclusion of law that the petitioner was estopped from asserting his claim by reason of the execution of said releases, and recommended that the petition of the trustees to reject and expunge such claim should be granted (pp. 43-45).

The report of the Special Master was confirmed by the District Court and an order was entered expunging and disallowing said claim (pp. 51-52).

From such order an appeal was taken by the petitioner to the Circuit Court of Appeals for the Second Circuit, which court as said, affirmed, by a divided vote, the decree appealed from.

A writ of certiorari has been allowed in the premises (pp. 63-64).

Statement of Facts.

Morton Atwater, Eliot Atwater, Gilbert F. Foote and Harold W. Sherrill in the year 1912 formed a partnership under the firm name and style of Atwater, Foote & Sherrill.

The original articles of co-partnership bear date June 1, 1912 (pp. 38-40).

Subsequently, and on the 3rd day of June, 1916, new articles of co-partnership were executed (pp. 40-42).

The firm carried on business under the original partnership agreement until the 3rd day of

June, 1916, and thereafter under the new articles until the failure of the firm and the placing of its affairs in bankruptcy.

The original articles provided that the contributions of the respective members should be as follows:

Morton Atwater, as capital, fifty thousand dollars $50,000

Gilbert F. Foote and Harold W. Sherrill, the good will of their previously established firm as agents of Post & Flagg, the value thereof being agreed upon as $10,000

Eliot Atwater, the use of a membership in the New York Stock Exchange.

The use of this seat was of great benefit to the firm. It lessened greatly the cost of purchasing and selling each day the securities bought and sold by the firm (p. 8). It also gave the firm the commissions each day earned by Eliot Atwater in buying and selling securities for outside parties.

The original articles further provided that all the earnings of Eliot Atwater as a member of the Exchange should accrue to the firm. They further provided that there should be paid to the said Eliot Atwater interest at the rate of six per cent. (6%) per annum upon the amount previously expended by him in purchasing a seat on the Exchange, being the sum of seventy-five thousand dollars ($75,000).

It was further provided that the business of the firm should be conducted in conformity with and subject to the constitution and rules of the New York Stock Exchange.

The articles also provided for a division of the profits equally between all co-partners.

The new articles contain the same provisions as the original articles except that the rate of division of earnings was changed: the interest to be paid Eliot Atwater was not to be upon the fixed sum of seventy-five thousand dollars ($75,000), but upon the average selling price during the preceding six months, and Foote was to be paid interest upon the same basis upon a Cotton Exchange seat.

The other changes in the articles are not material so far as concerns this controversy.

Eliot Atwater applied for a seat in the New York Stock Exchange and Edward S. Atwater, the petitioner, his father advanced the money to purchase the same (p. 7).

At that time and now the rules of the Stock Exchange require that before an applicant could purchase a seat thereon, he must file a general release from his debts and obligations. The purpose of this requirement appears in the Constitution of the Exchange as hereafter quoted (pp. 42-43).

When applying to the petitioner for the loan his son told him that for the purpose of complying with the said requirement of the Exchange it was necessary to sign releases in order to protect such creditors as might be members of

the Exchange against any prior lien on the seat in case of failure. This was before the signing of the release.

The petitioner on this subject testified as follows (p. 15):

> "He (Eliot) handed me the paper and said it was necessary for me to sign it, in accordance with the rules of the Stock Exchange, because the rule said about claims of members upon each other * * * it was necessary to waive my rights in accordance with that. * * * He told me it was necessary for me to sign that paper in accordance with the rules of the Stock Exchange, that it didn't amount to anything except to give the members of the Stock Exchange and the claims they might have against each other precedence over myself. I said I didn't think that amounted to anything and I signed it, though I didn't write to the Stock Exchange for any rules."

On the first day of May, 1912, the petitioner executed the releases in question (pp. 36-38) which were subsequently and before the transfer of the seat, delivered to the Stock Exchange authorities.

The releases upon their face, released Eliot Atwater from all claims, demands, etc., at that time existing in favor of his father, the petitioner. No parties are named in the instrument except the petitioner, Edward S. Atwater, and Eliot Atwater.

After the general release of all claims, demands, etc., the instruments recited in the one case—

> "And more particularly by reason of an advance of the sum of seventy-five thousand dollars ($75,000) made to said Eliot Atwater to enable him the said Eliot Atwater, to purchase a membership in the New York Stock Exchange." (p. 37).

and in the other case:

> "And more particularly by reason of an advance of two thousand and ten dollars ($2,010) made to said Eliot Atwater to enable him to pay his initiation fee to the New York Stock Exchange" (p. 38).

The purpose of the requirement of the New York Stock Exchange as to releases is shown in the following extracts taken from Article 15 of its Constitution:

> Sec. 3. Upon any transfer of membership, whether made by a member voluntarily, or by the governing committee, or the committee on admission in pursuance of the provisions of this constitution, the proceeds thereof shall be applied to the following purposes, and in the following order of priority, viz:—
>
> *First*: The payment of all fines, dues,

assessments and charges of the Exchange or any department thereof against members whose membership is transferred.

Second: The payment of creditors, members of the Exchange, or firms registered thereon of all filed claims arising from contracts subject to the rules of the Exchange, if and to the extent that the same shall be allowed by the Committee on Admission.

If said proceeds shall be insufficient to pay such claims as so allowed in full, the same shall be applied to the payment thereof pro rata.

Third: The surplus, if any, of said proceeds shall be paid to the person whose membership is transferred, or to his legal representatives, upon the execution by him or them of a release or releases satisfactory to the Committee on Admission (pp. 42-43).

It is conceded that there are no creditors of the firm of Atwater, Foote & Sherrill, members of the New York Stock Exchange, and no claim has been filed with the trustees by any creditor who are members of such Exchange (p. 44, Finding VI).

In the court below two questions were presented for decision:

(1) Was the Stock Exchange seat owned by the firm or was it the individual property of Eliot Atwater?

(2) Is the appellant (the petitioner) estopped from asserting his claim as against the firm or individual members?

The learned court below was unanimously of the opinion that the seat was the individual property of Eliot Atwater, but was divided in its opinion as to the effect of the releases given.

Circuit Judge Ward in an opinion dissenting from that of Circuit Judges Manton and Hough pointed out that while a release under seal could not be contradicted by one party as against the other or as against a third party who has been prejudiced by relying on it, in the absence of such prejudice both parties to a release may agree that as between themselves it was to be limited to a particular purpose and there being no evidence whatever in the case that any creditor of the bankrupt firm or of Eliot Atwater individually relied upon or even knew of the existence of the releases, there could be no estoppel in favor of the trustees in bankruptcy representing the creditors in general. The following quotation is taken from Judge Ward's dissenting opinion:

"In this case, for instance, if there had been no bankruptcy, Eliot Atwater and his father, Edward S. Atwater, could have agreed that the release though general was made for the benefit of the Stock Exchange creditors only and that the transaction was

as between themselves a loan by the father of the price of the seat to the son. If that was the fact, no other creditors of Eliot Atwater could prevent his father from recovering and collecting a judgment from him for the amount of the loan. So if Eliot Atwater had died, any admission by him to this effect could have been availed of by his father. *Sterling* v. *Chapin*, 185 N. Y., 395. On the other hand, any creditor of Eliot who had relied upon the release and who would be prejudiced by its being contradicted might insist upon its literal enforcement as to him. This on the ground of estoppel.

But there is no evidence whatever in this case that any creditor of the firm or of Eliot Atwater individually did so rely or even know of the existence of the release and I think there can be no estoppel in favor of the trustee in bankruptcy representing the creditors in general" (p. 62).

The majority of the court however, consisting of Judges Hogan and Maxton, placed their decision wholly on the ground that parol evidence was inadmissible to show the *purpose* for and the *condition* on which the releases were executed and that their effect must be determined solely by their express terms. We quote the following from the majority opinion:

"The scope and extent of a release depend as a rule upon the interest (intent) of the parties as expressed in the terms of the particular instrument. Parol evidence is inadmissible to prove that claims not included in the writing were understood at the time of the executing of the release to be embraced in the transaction. Parol evidence cannot be offered to vary the document (*St. Louis & S. F. Ry. Co.* v. *Dearborn Co.*, 60 Fed., 880; *Holbrook* v. *Sperling*, 239 Fed. Rep., 715). Parol evidence is admissible where, while not changing the nature of the contract, it shows the reason for the execution of the release and points out its use and application. But a valid release as conclusively estops the parties from reviving and litigating the claim released as a final act and it forever extinguishes a personal right of action. It completely discharges and extinguishes all rights and claims of the releasor against the releasee which are included in the release and this is true even though the releasee fails fully to perform a promise which was the consideration for the release unless the operation of the release was based upon full performance. Even if invalid, it is binding upon the parties until attacked in a proper manner and set aside. * * * A release like every other contractual obligation has for its primary rule of construction the intention of the parties. This must govern. This

intention, however, must be clear from the words used in the instrument and not from matter *de hors* the writing (*Hoes* v. *Van Hoesen*, 1 Barb. Chan. N. Y., 379 *Sherburne* v. *Goodwin*, 44 N. H., 271). The release here does not contain any limitation which would indicate an intent at the time of its execution of a conditional delivery so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation and thus defeat the claims of other creditors" (p. 60).

Thus while expressly admitting that parol evidence is admissible to show the *purpose* and *condition* of the delivery of an instrument, and that every contractual obligation has for its primary rule of construction the intention of the parties, the majority opinion holds that such rule is not applicable to a release, and that in order to limit its effect to the *purpose* for and the *condition* on which it was given such limitation must appear by the terms of the instrument itself and may not be established from matters *de hors* the writing.

The majority opinion, it is submitted, is in direct conflict with the rule laid down in many authorities by this Court and of universal application that, in the absence of estoppel, parol evidence *de hors* the writing is admissible for the purpose of showing the *purpose* of the execution of the writing and the effect which by the

agreement of the parties is to be given thereto.

The majority opinion is also in direct conflict with the decision by the Court of Appeals of the State of New York in *Sterling* vs. *Chapin*, 185 N. Y., 395, expressly holding that a release executed for the limited purpose of complying with the rules of the New York Stock Exchange and not with the intention of cancelling the indebtedness, would not bar recovery for the amount advanced for the purchase price of the seat by the releasor.

By the decision in the present proceeding, therefore, a direct conflict is created between the decision by the highest court of the State of New York and the decision by the Circuit Court of Appeals for the Second Circuit sitting in that State, as to the effect to be given to a release executed for the purpose only of complying with the rules of the New York Stock Exchange and with no intention as between the parties themselves of releasing the indebtedness except as to creditor members of the Exchange. In any proceeding brought in the State Court a release given for such a purpose will, therefore, be held to have an entirely different effect from that of the same or other release of like nature in a proceeding brought in the Federal Courts sitting in that State.

The membership of the New York Stock Exchange is 1100 members, four-fifths of whom execute releases under the requirements of the rules of the Exchange at the time of the purchase of their seats of similar character and im-

port to those in the present proceedings, and questions as to the rights of creditors, not members of the Exchange, are constantly arising by reason of members of the Exchange becoming insolvent, and numberless proceedings will in the future, as in the past be brought both in the State Courts and the Federal Courts, in insolvency and bankruptcy proceedings to establish the claims of creditors not members of the Exchange in the assets of an insolvent member. There is obvious necessity therefore of resolving the conflict between the decision of the highest court of the State of New York and the decision in this proceeding as to the rights of non-member creditors in the assets of an insolvent member of the New York Stock Exchange where a release has been given under the circumstances shown in the present proceeding.

BRIEF OF ARGUMENT.

First: The majority decision is in conflict with the rule of evidence announced by this Court and other Federal and State Courts, that in the case of any instrument, in the absence of an estoppel, it is always competent to show that it was not delivered, or that the delivery was upon certain conditions, or for a particular purpose.

Second: The majority decision is in direct conflict with the decision by the highest Court

of the State of New York in *Sterling* v. *Chapin*, 185 N. Y., 395, as to the effect of a general release given simply for the purpose of complying with the requirements of the rules and regulations of the New York Stock Exchange, and without an intention as between the parties to the instrument of discharging the indebtedness, except as to creditor members of the Exchange.

THIRD: The majority decision in its effect creates great confusion and inequality in the State of New York among creditors of insolvent Stock Exchange members, which dangerous and inequitable situation calls for a decision by this Court harmonizing the rule in the Federal courts with that in the State courts:

ARGUMENT.

POINT I.

In the absence of an estoppel, it is always competent to show that the delivery of an instrument was upon certain conditions or for a particular purpose, and its effect will be limited thereby.

By the express agreement and understanding between the petitioner and his son the releases

were executed wholly and solely for the purpose of complying with the rules and regulations of the Exchange *and for no other purpose*, and that *as between themselves the indebtedness would still exist* (Record, pp. 14-15).

That this was the understanding of the parties is wholly undisputed. The proof, therefore, is that the releases were given for a limited purpose only and on the condition that they should not discharge the debt, except as to creditor members of the Exchange.

Under such circumstances the releases should have been limited to that purpose and given no greater effect.

Peugh v. *Davis*, 96 U. S., 332;
Brick v. *Brick*, 98 U. S., 514;
Jackson v. *Lawrence*, 117 U. S., 679;
Cabrera v. *American Colonial Bank*, 214 U. S., 224;
Valdes v. *Central Altagracia*, 225 U. S., 58;
Ducie v. *Ford*, 138 U. S., 587;
Western Underwriting & Mortgage Co. v. *Valley Bank of Phoenix*, 237 Fed. Rep., 45;
Lumley v. *Wabash Railroad Co.*, 76 Fed. Rep., 66.

To the same effect are the decisions by the highest court in the State of New York.

Herrick v. *Carman*, 10 Johnson, 224;

Grierson v. *Mason*, 60 N. Y., 394;
Matthews v. *Sheehan*, 69 N. Y., 585;
Juilliard v. *Chaffee*, 92 N. Y., 529;
Marsh v. *McNair*, 99 N. Y., 174;
Schmittler v. *Simon*, 114 N. Y., 176;
Ensign v. *Ensign*, 120 N. Y., 655;
Thomas v *Scutt*, 127 N. Y., 133;
Blewitt v. *Boorum*, 142 N. Y., 357;
Baird v. *Baird*, 145 N. Y., 659;
Higgins v. *Ridgway*, 153 N. Y., 130;
Sterling v. *Chapin*, 185 N. Y., 398;
Grannis v. *Stevens*, 216 N. Y., 583;

In *Peugh* v. *Davis*, *supra*, this court had before it a deed absolute in form but claimed to have been executed as security for a loan of money. It was held that evidence *de hors* the writing was admissible to show the real purpose of the transaction.

In *Brick* v. *Brick*, *supra*, the rule in *Peugh* v. *Davis* was followed with respect to a pledge of a certificate of stock as security for a loan of money.

In *Cabrera* v. *American Colonial Bank*, *supra*, in which it was claimed that a bill of sale was an absolute conveyance and accomplished the payment of debts to a bank, this court said:

> "The face of an instrument is not always conclusive of its purpose. In equity extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circum-

> stances of the parties and executes their real intention and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be proved."

In *Grierson* v. *Mason*, *supra*, the plaintiff tried to prove that his commissions were to amount to at least $1500 a year. The defendant offered in evidence an agreement between the parties limiting these commissions to five per cent. The plaintiff was permitted to prove that the *purpose* for which this agreement was executed was not to limit the amount but to induce one Woods to advance money upon the goods. The Court of Appeals of New York said:

> "Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony but tends to explain the circumstances under which such an instrument was executed and delivered or to show that it was cancelled or surrendered."

Such a rule obviously is necessary to prevent fraud.

The majority opinion in the court below, it is submitted, is in direct conflict with the salutary rule laid down in the cases referred to and the true rule is stated in the minority opinion to the

effect that the petitioner and his son "could have agreed that the release though general was made for the benefit of the Stock Exchange creditors only and that the transaction was as between themselves a loan by the father of the price of the seat to the son" and that in the absence of evidence showing "that any creditor of the bankrupt firm or of Eliot Atwater individually did so rely or even know of the existence of the release * * * there can be no estoppel in favor of the trustee in bankruptcy representing the creditors in general." (Opinion, WARD, CIRCUIT JUDGE, Record, p. 62).

POINT II.

The majority opinion also is in direct conflict with the decision by the highest court of the State of New York in *Sterling v. Chapin*, 185 N. Y. 395.

In *Sterling* v. *Chapin*, the testator advanced money to his brother, the defendant (they being partners in a stock brokerage business) for the purchase of a seat in the New York Stock Exchange. Testator executed a release in which he released his brother, the defendant, from all claims and demands which he had by reason of the advance, which release was delivered to the authorities of the Stock Exchange at the time of

the purchase of the seat by the defendant. The evidence showed that notwithstanding the giving of the release the parties always considered as between themselves that the indebtedness existed.

Holding that the release was not a bar to a recovery by the executor of the testator of the monies advanced, it was said by the learned Judge writing for the NEW YORK COURT OF APPEALS:

> "A rule or custom of the New York Stock Exchange required that before a person could be elected to membership, he must show that there were no outstanding claims against him, and if he had borrowed money with which to purchase his seat, it was necessary to file with the Exchange a release of this claim *for the benefit of the other members of the Exchange.*"
>
> "I have already referred to the rule of the Stock Exchange which required an assurance that a proposed member was free from indebtedness *as a protection to the members* against an claim which any person might have for moneys advanced for the purchase of the seat. The defendant was about to become such member. *** He executed the instrument which as between him and the Stock Exchange would have operated to prevent any claim for this advance in whichever form made.
>
> "So far as appears the defendant never saw or heard of it, and it seems to me that

upon this evidence alone the fair presumption would be that the testator executed the instrument simply for the limited purpose of complying with the rules of the Stock Exchange, and that otherwise said release was not intended to cancel any indebtedness."

In the present case, the purpose of the petitioner in executing the release in question is not left to implication as in the case above cited, but the purpose and intent of the petition is expressly proven by the conversations between him and his son, Eliot Atwater hereinbefore set forth.

The Court in the case cited further lays stress upon the fact that interest was charged against the defendant upon the books of the firm upon the amount advanced. Speaking of these charges of interest, the Judge writing, says:

"It seems to me that these acts are so deliberate and long continued and are so entirely inconsistent with and opposed to the idea that this indebtedness has been cancelled that we ought not to permit such effect against an estate from a purported release, executed for a mere normal consideration, unless we are compelled to. I do not think we are thus compelled to, but that in the manner indicated such effect may be given to both the release and entries on the books as will accomplish the true intent and understanding of the parties."

If the mere act of "charging interest" upon the books carries the weight of inference above set forth, how much weightier must be the conceded fact that in the case at bar each six months down to the time of the failure interest was in fact paid.

> NOTE: There is a dissenting opinion, *Sterling* vs. *Chapin*, but it does not touch the principles above involved. The dissenting Judge only claimed that under the evidence the action should have been brought, not for a co-partnership accounting, but to recover of the defendant as a claim owing to the defendant individually.

The majority opinion sought to distinguish the case cited on the ground that in that case no rights of creditors arose and that the release was delivered to the Stock Exchange and not to the borrower of the money. It is submitted the decision cited is not distinguished on these grounds. In the present case it was not shown, and this fact is expressly stated in the minority opinion of the CIRCUIT JUDGE WARD, that any creditor of the firm or of Eliot Atwater individually relied on the release or even knew of its existence and for that reason there could be no estoppel in favor of the trustees in bankruptcy representing the creditors in general. (Opinion, WARD, CIRCUIT JUDGE, Record, p. 62). The creditors therefore could have no greater rights than the debtor himself, and if as to him the release

was not effective (except as to creditors members of the Exchange) to discharge his indebtedness to his father, it could not be availed of by the general creditors. Nor, it is submitted, does it make any difference whatsoever that the release was delivered to Eliot Atwater and by him delivered to the Stock Exchange instead of a direct delivery to the Exchange as was made in the case cited. The *purpose* for and the condition on which the releases were given determine their effect and not the mere manual agency through which the delivery was made.

POINT III.

The effect of the majority decision is to create great confusion and inequality in the State of New York among creditors of insolvent Stock Exchange Members.

The membership of the Exchange is 1100 members, four-fifths of whom have executed releases of similar import to the one in suit.

In proceedings brought in the State courts of New York against an insolvent member, under the decision by the Court of Appeals in *Sterling* v. *Chapin* (*supra*) the effect of these releases though general in form may be limited to and

availed of only by creditors, members of the Exchange, while in a proceeding in the Federal courts sitting in that State, under the decision by the Court below they may be availed of by general creditors not members of the Exchange to bar the proof of a debt never intended by the parties to the releases to have been included in it.

Moreover, while under the State court decision an individual creditor, in accordance with the provisions of the Bankruptcy Act, Section 5, Clause F, may prove his debt and secure priority in payment thereof out of the individual assets of a member of an insolvent firm over claims of partnership creditors, under the decision by the Court below, an individual creditor will be barred from proving his debt, and thereby the provisions of the Bankruptcy Act will be defeated.

Thus, under the decision by the Court below firm creditors, non-members of the New York Stock Exchange, will have greater rights, and individual creditors will have less rights in the assets of an insolvent Stock Exchange firm and the members thereof, than non-member creditors pursuing their remedies in the State courts.

This dangerous and altogether inequitable situation, it is submitted, calls for a decision by this Court harmonizing the rule in the bankruptcy and other Federal courts with that in the State courts of New York.

POINT IV.

The judgment appealed from should be reversed and the claim of the Petitioner as an individual creditor of Eliot Atwater should be allowed.

Respectfully submitted,

ABRAM J. ROSE,
FRANK B. LOWS,
Counsel for Petitioner.

CASES CITED.

Supreme Court
OF THE UNITED STATES

EDWARD S. ATWATER, Petitioner, *vs.* STEPHEN G. GUERNSEY, SAMUEL H. BROWN and CHARLES A. HOPKINS, Trustees in bankruptcy of MORTON ATWATER, et al., etc.	October term, 1920. No. 511

Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, as trustees in bankruptcy for all the above named bankrupts respectfully make and file this brief as the respondents herein.

FACTS

The petitioner Edward S. Atwater filed a claim against the individual estate of Eliot Atwater for $75,000, money advanced by him to his son, the said Eliot Atwater, to be used in the purchase of a seat in the New York Stock Exchange. (Page 1 of Record). The trustees in bankruptcy objected to the allowance of the claim and moved to expunge the same. (Page 3 of Record). The matter was referred to a Special Master, who made a report establishing the facts and holding as a conclusion of law that the petitioner was by reason of the execution of certain releases, barred and estopped from asserting his claim and that the petition of the trustees to reject and expunge such claims

4 should be granted. (Page 43 of Record). A decree was made by Mayer, Judge of the United States District Court, for the Southern District of New York, confirming the Special Master's report and ordering that the proof of claim, filed by the petitioner against the individual estate of Eliot Atwater, be expunged and disallowed. (Page 51 of Record). An appeal was taken from the order and decree of said United States District Court to the United States Circuit Court of Appeals for the Second Circuit and a decree was made by that Court affirming the order and decree of the United State District Court.

5 The individuals composing the bankrupt firm entered into an agreement on June 1, 1912, whereby they formed a partnership under the firm name and style of Atwater, Foote & Sherrill. (Claimant's Exhibit 1, Page 38 of Record.)

Under this agreement Eliot Atwater was to put in the use of his membership on the New York Stock Exchange and every six months there was to be paid to him "such an amount as shall pay interest for six months at the rate of six per cent. per annum on $75,000," being the purchase price and

6 initiation fee of his membership on the New York Stock Exchange. Apparently contemporaneously with the signing of the co-partnership agreement, to wit, May 1, 1912, at any rate, on that day, Edward S. Atwater, the petitioner, executed and delivered to Eliot Atwater two releases. (Exhibits A and B, Page 36 and 37 of Record.)

The questions therefore presented to the Special Master were:

A. Did the purchase of the Stock Exchange Seat at the time of its purchase or at any time afterward become the asset and property of the firm? 7

B. Or whether it upon such purchase and ever afterward remained the individual property of Eliot Atwater.

C. If it remained the property of Eliot Atwater is the petitioner entitled to enforce his claim against his son's assets or is he barred by reason of the execution of the releases before referred to?

The Special Master held that the seat was the individual property of Eliot Atwater. (Page 43 of Record.) 8

First: That Eliot Atwater became the individual owner of the seat in the New York Stock Exchange on May 16, 1912, and was such individual owner at the time of the filing of the petition in bankruptcy. (Page 44 of Record.)

Second: The said seat was never the property of the firm of Atwater, Foote & Sherrill.

Third: That by the execution and delivery to said Eliot Atwater by Edward S. Atwater, the petitioner, of the releases, trustees' exhibits A and B as shown in the record, the said Edward S. Atwater was barred and estopped from asserting a claim to the profits of said seat or as an individual creditor of said Eliot Atwater for the moneys advanced toward the purchase price thereof and for initiation fees in said exchange has received precedence 9

in bankruptcy action of the general creditors of the firm of Atwater, Foote & Sherrill.

The U. S. District Court on the 14th day of January, 1920, confirmed the Special Master's report and expunged and disallowed the claim of said Edward S. Atwater against his son, Eliot Atwater, (Page 51 of Record,) and on the 29th day of May, 1920, a decree was made by the Circuit Court of Appeals for the Second Circuit affirming the decree in the United States District Court (Page 62 of Record) and the petitioner herein now seeks to have the decision of the Circuit Court reviewed and the sole question to be considered by this court is (A) whether parole evidence was competent to vary or explain the terms of the original release as against the trustees and (B) whether the releases as evidence are not a bar to appellant's right to establish his claim against said Eliot Atwater. There are no creditors of the firm of Atwater, Foote & Sherrill members of the New York Stock Exchange and no claim has been filed with the trustees by any creditors who are members of such Exchange.

POINT I.

STOCK EXCHANGE SEAT BELONGED TO ELIOT ATWATER AND THE PROCEEDS OF SALE CANNOT BE CLAIMED BY APPELLANT.

All the facts connected with the purchase of the seat, obtaining of moneys to be paid for the same, the purpose and object of the purchase, the dealings of the firm with relation to the seat are conceded, and offer no ground for dispute. The par-

ties themselves interpreted the release between themselves when contributing to the assets of the firm at its creation Eliot Atwater's contribution being "the use of his membership in the New York Stock Exchange" and they further provided that each six months there should be paid to him "interest at the rate of six per cent. on $75,000" being the purchase and initiation fee of his membership in the New York Stock Exchange. The testimony shows that such interest was paid by the firm, therefore, to Eliot Atwater or his father upon the said $75,000. No change was made by the articles of co-partnership affecting or relating to the $75,000 except the firm was to pay interest only on the average selling price of a seat during the preceding six months. The testimony shows that after the new arrangement the amount paid by the firm did not equal six per cent. upon $75,000 to Eliot Atwater. (Record, Page 31.)

It is difficult to understand how on the foregoing conceded facts any controversy can have arisen as to the ownership of the seat in question. *The fact of the ownership by the said Eliot Atwater of the seat in the Stock Exchange is established by the Special Master's report, order of confirmation and decision of the Circuit Court of Appeals.*

That the Stock Exchange Seat purchased by Eliot Atwater, became, when purchased in his own name, the individual property of said Eliot Atwater, may not be questioned when all of the circumstances connected with the transaction are considered together with subsequent exercise of ownership over same by him.

16 Attention is respectfully called to Paragraph Tenth of the Articles of Co-partnership of the firm of Atwater, Foote & Sherrill.

By the terms of that paragraph, Eliot Atwater gives to his partners, Foote & Sherrill an option to purchase from him said seat at the current price which might exist at the time of the dissolution of the firm. This negatives any interest of anybody else in said Seat but is predicated upon the sole ownership of said Eliot Atwater.

The testimony of both father, Edward Atwater, the petitioner and his son Eliot Atwater clearly
17 sustains the intention of the Respondent that said Stock Exchange Seat was property of latter, unencumbered by any claim of his father, the petitioner.

Here it may be parenthetically stated that most testimony was admitted, some of it under objection of which was to explain the transaction between father and son in connection with this transaction and for the purpose of explaining the release by Edward Atwater to his son Eliot Atwater all of which should have been excluded for the reason that the instrument in question (release) is full, complete and clear in its phraseology and general
18 in its terms, with no ambiguity of any kind. This is not an action between the parties to said release to set aside same by fraud or mistake in which case the rules of evidence are greatly relaxed.

Aside from the above the testimony of both Edward Atwater and his son clearly show that the claim of Edward Atwater is an afterthought, one

which was suggested by a more astute mind than his own. He was asked the following question: 19

"Q. When did you first make up your mind that you would present a claim for that amount of money?"

"A. When I was put into the Bankruptcy Court, the whole matter was referred to my attorneys for their opinion." (Record, page 18).

Edward Atwater, further testified:

"Q. Did he (Eliot Atwater) ever agree to repay to you $75,000 at the time you loaned it to him?"

"A. No, I don't think he did." 20

The writer of this brief regrets being compelled to criticise the above question asked by counsel who conducted the trial but it is too apparent that what he intended to ask was, "At the time of this transaction did he ever promise to repay the $75,000"? The word "loaned" was evidently inadvertently used, the transaction constituting a gift and not a loan. It matters not however, as the answer "No, I don't think he did" is entirely sufficient.

The testimony throughout the case clearly establishes a gift. 21

It is most apparent that the petitioner intended the $75,000, the price paid for the Stock Exchange Seat, to be a gift to his son Eliot, the same to be Eliot's contribution to the firm of Atwater, Foote & Sherrill. Apart from the general terms of the release, which he, Edward Atwater, had executed,

22 the force and effect of which he must have known, is as he testified, that he was a member of the Bar of the State of New York, he testified that the $75,000 in question was one source of the capital of the firm of Atwater, Foote & Sherrill. (Record, page 17).

He further testified as follows:

"Q. At the time you signed the paper (release) did you make any agreement with your son that he obligated himself to return the money to you?"

"A. I don't know that I did."

23 "Q. Was anything said by him as to the repayment of this money to you and when?"

"A. No, I don't suppose there was."

Throughout his entire testimony Edward Atwater has denied that there was ever made any promise by his son Eliot Atwater to repay to him the sum of $75,000, and it is too apparent that that sum was a gift to his son and so considered by him and his son, the latter testifying that he thought that there might be a moral obligation on his part to repay that sum to his father.

24 Eliot Atwater further testified that the $75,000 was a "firm asset" (Record, page 24) and that the Seat was a gift to him (Record, page 24) and that his, Eliot's understanding of the transaction was to the effect that his father had released all claim on his part upon the same (Record, page 25) and that there was no legal obligation against him, Eliot in favor of his father (Record, page 25) and

that he, Eliot had never acknowleslged any moral 25
obligation to pay the same. (Record, page 25).

From the above it is too plain that the understanding, purpose and intent of both father and son, the petitioner and Eliot Atwater, at the time of the purchase of the Seat and execution of the release were that the same should constitute and carry into effect a gift inter vivos between the father and the son, of the purchase price of said Seat, and that said Seat should be Eliot Atwater's contribution to the firm assets of Atwater, Foote & Sherrill.

If therefore this contention is right, and at that 26
time the purpose of the two parties to the release was as above indicated, can the petitioner at this time successfully attack that gift and maintain that the transaction was only intended as a loan, the same to be recovered at a subsequent and indefinite time? Edward Atwater, the petitioner, had full knowledge, as the testimony shows, that the firm was holding itself out to the public as a member of the New York Stock Exchange. Can it be successfully contended that such representation did not give additional credit to that firm with the public? Edward Atwater enabled the firm to obtain large 27
credit and eventually cause serious loss to its customers. It is respectfully submitted that it is too late now for him to attack the gift made to his son, especially so, as the interest of creditors intervene.

The fact that Eliot Atwater did from time to time pay to his father interest on said sum in no way changes the character of the transaction any more

than it would have, had the petitioner given to his son a general warranty deed of real estate should said real estate have been turned over to the firm as an asset, though thereafter Eliot Atwater had seen fit to pay his father rent for the same.

None of the cases relied upon by the petitioner are on all fours with the instant case. In the present case there is no promise to pay, no evidence of indebtedness and acknowledgment of same. The release, general in its terms, standing as it does binding upon the petitioner may not be attacked at this time and in this manner.

To avoid the effect of same it is respectfully submitted that a suit in equity for that purpose would have to be instituted in which all persons interested would have to be made parties.

This eleventh hour attempt to alter what is apparently a gift, into a loan, is manifestly for the purpose of defrauding creditors who relied upon the standing and reputation and financial credit of the firm of Atwater, Foote & Sherrill which credit etc., was contributed to in no small part by the possession and ownership of the Seat on the New York Stock Exchange.

POINT II.

THE APPELLANT IS ESTOPPED FROM ASSERTING HIS ALLEGED CLAIM AS AGAINST THE FIRM OR INDIVIDUAL CREDITORS.

Estopped by releases under seal.

An examination of the releases which are under seal and appear in Pages 36 and 37 of the Record

shows that they not only released Eliot Atwater 31
from all claims and demands, but especially by reason of the advance of $73,000 by the father, the appellant, to enable him to buy a seat and to pay his initiation fee in the Stock Exchange. These releases are still in force and have never been surrendered or cancelled. They were delivered by the father to his son, Eliot Atwater, who in turn delivered them to the New York Stock Exchange. (Record, Page 4.)

After their delivery to the son, by him to Stock Exchange, there was no liability of any kind on the part of Eliot Atwater to repay such sum to his 32
father, Edward S. Atwater, the petitioner. There does not appear in the Record any evidence of any revival of the debt after the delivery of the releases nor is there any proof of any promise to pay the money or revive the debt. On the contrary testimony of Eliot Atwater on this subject given before the referee is as follows:

"Q. I read from the minutes at the adjourned first meeting of creditors taken before Harry Arnold, Esq., Referee, under date of June 22, 1918, at page 784: (Record, Page 24)

33
Q. Did your father Edward S. Atwater sign that release? A. He did.

Q. Stating to the Exchange and to the Secretary that there was no claim whatsoever upon that seat? A. That's right.

Q. And that the Seat was a gift to you? A. I am merely stating my recollection.

34 Q. Was the paper in writing that you produced? A. Yes, sir, what I saw in 1912 and am stating my best recollection.

Q. It was your understanding at the time and has been since that the papers executed by your father and the conditions under which the purchase of this Seat was made had to be an absolute gift in order for you to own that Seat? A. I understood it had to be released on his part of all claim.

Q. And that he had no claim against you personally for it, is that correct? A. I considered he
35 had a moral claim against me for it.

Q. You owed a moral obligation to him? A. Yes, sir.'

Q. Do you recall so testifying? A. If you read it I will agree that I testified to it.

Q. I am reading from page 785 of the same testimony: (Record, Page 25)

'Q. So far as the deal itself was concerned, from your talks with your father and from the papers you understood had to be signed, it was a gift to you? A. I have no talks with my
36 father, but I understood from the paper that there was no claim against me legally by him.'

Q. Do you recall so testifying? A. If it is in there, I testified to it.

Q. Was the testimony I have read to you true, and the answers you made true? A. Yes, sir, as to my conception of it at that time.

Q. I am reading from page 795 of the same testimony: (Record, Page 25) 37

'Q. Did you ever acknowledge any moral obligation? A. No, sir.'

Q. Do you recall so testifying? A. I don't know what it applies to. If it is in there as my testimony, I said so."

It will be noticed that in the foregoing testimony Eliot Atwater states that he owed a moral obligation to his father, but, at folio 146, he testified as follows:

38

"Q. Did you ever acknowledge any moral obligation? A. No, sir."

We call attention to Eliot Atwater's understanding to the effect of the release, although the release speaks for itself. In his testimony, (Record, Page 27, Folio 54) "I understood from the paper that there was no claim against me legally by him."

Edward S. Atwater, the appellant, further testified (Record, Page 12) that the subject of this advance of $75,000 for the purchase of the seat was never discussed between him and his son after he had advanced the money, *and that he does not remember that his son ever agreed to repay the money to him*, and, (Record, Page 26) he testifies that his son never made any statement to him relative to the money or made any agreement with him for the repayment of the money and that he had no memorandum or promise. 39

40 The testimony which is quoted above was given by Eliot and Edward S. Atwater shortly after the filing of the petition in bankruptcy at the hearing at the first meeting of creditors.

It is thus entirely clear from the testimony of the bankrupt and his father the appellant that the original debt was released, and that there was no legal or moral obligation to repay the money.

It has been claimed by the counsel for the appellant in his brief that the payment of the interest to the father by the son, and afterwards by the firm to the son, shows an intent to revive the obli-
41 gation, notwithstanding the absolute release thereof in writing and under seal.

We respectfully submit that, in view of the testimony, the payment of this interest does not in any way prove the existence of a debt from the son to the father, even between themselves, and certainly not as against creditors.

It must be noted that in the first partnership agreement it was provided between the partners that interest should be paid to Eliot Atwater at the rate of 6 per cent. upon the $75,000, the pur-
42 chase price and initiation fee of his membership on the New York Stock Exchange, and that in the second agreement interest was paid to Morton Atwater on the amount of capital furnished by him, and also the same provision was contained in reference to the payment of interest to Eliot Atwater upon the value of his New York Stock Exchange seat, and interest was also agreed to be paid to Gilbert F. Foote upon the value of his Cotton Ex-

change seat. *What arrangement there was between Eliot Atwater and his father which induced him to hand over the interest received by him from the firm does not appear, and in the face of the positive evidence shown by the releases that no debt was existing and the absence of any proof reviving the debt as a legal or moral obligation, the mere payment of interest by the son to the father, or afterwards directly to the father by the firm during the absence of his son, created no legal or moral liability for the repayment of the principal*, and the fact that the interest was so paid has no probative force in this proceeding to establish any debt in favor of the appellant. 43 44

No legal liability having been established, the question arises, could there be any moral liability which would enable the petitioner, Edward S. Atwater to enforce his claim against his son in bankruptcy? It must be remembered that even if there were any moral obligation, it could only be used in certain cases as a consideration for a new promise to pay the debt after the giving of the releases.

Assuming, for the sake of argument, that an inference might be drawn from any testimony, facts or circumstances presented in the record, of a promise to repay this money, there would be no consideration to support it, and it would not revive the debt, because it has been well settled by authority that where a person voluntarily releases a debt due him no moral obligation upon the part of the debtor survives which would furnish an adequate consideration for a subsequent promise to pay. It is only where the creditor is forced by in- 45

46 voluntary proceedings to release his debt that there remains the moral obligation which would furnish a consideration for a promise to repay it.

(See *Taylor v. Hotchkiss* and cases cited, 81 App. Div., p. 470, at pp. 475-476; affirmed in Court of Appeals, 179 N. Y. 546.)

It thus appears that any debt existing in favor of the father against the son was absolutely extinguished by the releases and was never revived.

Counsel for appellant ingeniously argues in his brief that the effect of these releases could only be

47 invoked by creditors who were members of the Stock Exchange, and that other creditors cannot take advantage of it. *It is urged on behalf of the trustees that this release was effective not only in so far as it related to the members of the Stock Exchange, but was* also in favor of all persons who had dealings with the firm of Atwater, Foote & Sherrill and became creditors of such firm or of Eliot Atwater. While as between the parties Eliot and the appellant, Edward S. Atwater, some such arrangement might have been made, this Court, under the circumstances and in view of the facts

48 hereinafter shown that the firm advertised that they were members of the New York Stock Exchange, will not permit Edward S. Atwater to now re-assert his claim either as against the creditors of Eliot Atwater or creditors of the firm.

This Court will not lend its aid in the enforcement of such an alleged obligation, as the appellant now asserts, after his conclusive release of

any debt he had, by written releases, under seal and his acts tending to deceive the firm creditors as well as the Exchange. 49

The appellant does not come into this Court with clean hands. On the contrary, he wishes the aid of the Court in helping him to perpetrate a fraud. He admits that his son could not purchase a seat on the Exchange unless the obligation to repay the money loaned to him for the purchase of the seat was expressly released in writing, and also that his son had to make a statement that he was the sole owner of the seat on the Stock Exchange without any encumbrance.

50

Having released his claim and allowed his son to make the above statement, the obligation of his son to him was extinguished absolutely. While it may be true that the main purpose of the rules of the Exchange in requiring a person who loans money to another wishing to purchase a seat on the Exchange is to protect its own members, the release does not contain a limitation of this kind, and such limitation cannot be read into it now for the purpose of defeating the claims of other creditors.

A similar question was passed upon by the Court, Southern District of New York in Matter of *J. M. Fisk* & *Co.*, decided by Seaman Miller, Esq., Referee, under date of July 12, 1912, whose findings were confirmed without opinion by a former Judge of the United States District Court, Hon. George C. Holt. 51

In that case, Eugene R. Washburn, the father, made a claim for $85,500 advanced to his son for

52 the purchase price of a seat on the Stock Exchange. Releases exactly like the ones in this case were given by the son to the father, and simultaneously with the execution of the release, the son gave the father his promissory note, promising to pay the sum of $85,500. The Referee said:

> *"In my opinion, the note in no way affected adversely the creditors of J. M. Fisk & Co., as the father had by the foregoing instrument in writing released the whole world from the payment of the sum involved in the original transaction whereby the Stock Exchange seat*
53 *was purchased."*

That case was much stronger than the case at bar, for in the former there was an actual written promise to pay the released indebtedness. The Court expunged the claim both against the firm and against the individual partner.

The appellant urges in his brief that his claim should be allowed under the authority of *Sterling v. Chapin*, 185 N. Y., 395. A careful reading of this case will enable this Court to note the distinction between it and the case at bar.

54 *Sterling v. Chapin* (*supra*) was an action for a co-partnership accounting between two brothers—the plaintiff's testator and the defendant. No question arose in that case as to the rights of creditors of the firm. The question decided was merely as to the rights between the partners, one of whom, the deceased partner, had advanced all the money for the purchase of the seat. While the deceased partner had given a release to the Exchange sim-

ilar to the one in the case at bar, there was not any 55
evidence that was ever delivered to or even seen or heard of by the defendant. An account was opened in the books of the co-partnership several days after the execution of the release and was carried on such books at the time of its dissolution, and in that account the defendant each year exclusive of the one ending when the co-partnership was dissolved, was charged with interest upon the balance shown to be due from him, and was credited with various payments—the balance at the date of its dissolution due from him being $37,708.80. In addition to which the defendant more than two and one-half years after the execution of the release 56
wrote to his brother a letter which acknowledged his indebtedness to him of the amount so charged against him. The Court of Appeals in making its decision said, at page 402:

> "Many days after the release was executed the defendant charged himself upon the co-partnership books with cash advanced for his seat. These entries mean that on that day the firm advanced said money, and first became his creditor upon the transaction in question."

The court continuing said (p. 403):

57

> "What I emphasize is, that we have here an uncontradicted and unexplained admission of the defendant, by entries which are binding upon him, that upon a certain date the co-partnership advanced money to or for him, and that this co-partnership indebtedness was not affected by a prior individual release of one co-partner."

58 *Attention is again called to the fact that no rights of creditors were in any way affected, and that the testator had supplied the entire co-partnership capital,* out of which money was advanced for the purchase of the seat, and the Court said, at the foot of page 400:

> "If a co-partnership transaction, it would not have been strange or conclusive against plaintiff's claim, if in a release, not having that point in mind, he had definitely recited that the advance was made by himself; but this he did not do."

59 The Court further treated the moneys advanced for the purchase of the seat as a part of the capital of the firm and said (p. 401):

> "When we consider the facts that subsequently the parties by an account with items extending over seven or eight years expressly and continuously admitted that the co-partnership advanced money with which to purchase the seat, and that the defendant was indebted to such co-partnership for such advance, all uncertainty vanishes, and we have
60 proof which is conclusive upon this appeal that the matter was a co-partnership and not an individual transaction."

ESTOPPEL BY REASON OF OTHER ACTS.

An examination of the record discloses that from the inception of this firm down to the filing of the petition in bankruptcy it advertised extensively in

newspapers in the City of Poughkeepsie as "Members of the New York Stock Exchange," and all of their stationery, including their checks, bore this statement, and this fact was also prominently lettered on the windows of their offices. 61

That the firm was so advertising and holding out to the world that they were "Members of the New York Stock Exchange" was well known by Edward S. Atwater, the petitioner herein. (Record, page 22).

The words "Members of the New York Stock Exchange" certainly conveyed to the public the impression that the firm owned the seat and was a representation that it was a part of the firm assets. 62

Having acquiesced in the representations as to the ownership of a seat, and having absolutely released all claims against his son, the petitioner is estopped from asserting his claim as against creditors who relied on the fact that the firm was the owner of this seat, and the Court must at least hold that the petitioner's rights are subordinated to the claims of creditors who traded with this firm on the strength of the fact that it was, or one of its members was, the owner of the Stock Exchange seat.

The release was executed and delivered to Eliot Atwater for the purpose of showing to the Exchange that Eliot Atwater was freed from any indebtedness by reason of the loan, and thus made him solvent and able to perform financially his obligations. It cannot be now claimed that in fact the indebtedness was not discharged and that simultaneously with the execution of the release, or at 63

64 the time the loan was arranged, Eliot Atwater agreed to repay the same. If this were so the effect was to deceive the Exchange and the customers of the firm who dealt with it in reliance on the fact that the firm owned the seat.

The Court will not lend its aid in the enforcement of a contract the result of which was to deceive the customers of the firm.

POINT III.

65 **WITH RESPECT TO THE CREDITORS OF THE FIRM, THE RESPONDENTS' CONTENTION IS, THAT THE NEW YORK STOCK EXCHANGE SEAT WAS A CO-PARTNERSHIP ASSET.**

An examination of the testimony shows that it was a contribution to the capital of the firm by Eliot Atwater. This was admitted by the appellant at Record, page 17, where, in answer to a question as to whether the seat was one source of the capital that the firm of Atwater, Foote & Sherrill were to have, he replied, "Yes, sir, that was it." and Eliot Atwater, after stating that there was no
66 obligation to his father at the time the seat was bought, stated (Record, page 24), that the seat was his contribution to the firm assets and his reason for getting in the firm.

Harold Sherrill testified that Morton Atwater's contribution of the capital of the firm was to be $50,000, and Eliot Atwater's contribution was that he contributed the seat.

It is now argued on behalf of the appellant that 67
the co-partnership agreement indicates that the
seat was not a contribution to the firm, but that its
use was merely given to the firm. It will be noted
that the same thing might be said of the $50,000
working capital which Morton Atwater contrib-
uted, because, taking the language of the agree-
ment, it is stated that "Morton Atwater furnishes
to the partnership the loan of $50,000 working cap-
ital" and that Eliot Atwater furnishes "the use of
his membership on the Stock Exchange." Both
these contributions, it will be noted by the agree-
ment, were contributions to the *capital* of the firm,
and the fact that in one case where the money was 68
contributed it is stated to be a loan to the firm, and
in the other case where the seat is contributed it is
stated to be the use of the seat, does not alter the
fact that both made up the capital of the firm, and
Morton Atwater could not appear as a creditor un-
til other creditors were fully paid, nor could Eliot
Atwater claim his seat until creditors were fully
paid.

The Court must determine the question as to
whether the seat was a co-partnership asset, not
only from the testimony of the parties themselves
above referred to, but also in the light of all cir- 69
cumstances surrounding the purchase and use of
the seat by a co-partnership of stock brokers.

Under the rules of the Stock Exchange the firm
as such cannot have a seat in its name. It is al-
ways placed in the name of one of the partners,
even although the firm may contribute the money
for its purchase. It is for this reason that the seat

when purchased is placed in the name of a member of the firm. In fact, the appellant took part in the negotiations which led to the formation of this firm and testified (fols. 96 and 97) that there was talk about financing it, and as to whether they would need any capital, and the first talk that he had was, that he would furnish the means to buy a seat on the New York Stock Exchange, and that that was not enough, because Foote & Sherrill (the established firm into which the Atwaters were entering) felt as well as the Atwaters themselves, that they needed more money to do the business and the appellant said he was ready to contribute more. Whatever he contributed was put in by his son Morton Atwater as part of the capital of the firm.

It is perfectly clear that, inasmuch as under the rules of the Exchange the legal title to the seat had to be in the name of some individual member of the firm, and as it was a contribution to the *capital* of the firm by Eliot Atwater, it had to remain in his name. By reason of said rules it was necessary in preparing the co-partnership papers to so word the agreement as not to violate the rules.

All contributions to the capital of a firm are for the use of the firm. On dissolution such capital (if the firm is solvent) is returned to the respective contributors. When Eliot Atwater contributed the use of his seat on the Exchnage, he contributed the seat iself as a part of his capital.

Attention is also called to the fact that objection was made to the parole evidence introduced by the

appellant which tended to contradict the effect of the sealed releases. We think this objection was perfectly valid, inasmuch as the trustees was a privy of one of the parties to the release, to wit: Eliot Atwater. The rule is too well settled to require argument that parole evidence cannot be used to controvert or vary a written instrument in an action or proceeding as against the parties to the instrument or their privies. 73

POINT IV.

THE AUTHORITIES CITED BY THE APPELLANT DO NOT SUSTAIN HIS CONTENTION AS TO THE EFFECT OF THE RELEASE. 74

The appellant seeks to evade the effect of the estoppel created by the acts of his son and himself by now claiming that he can assert his claim against his son after rights of creditors have intervened, and the decisions cited by him page 24 of his brief attached to the moving papers on his application for a writ of certiorari are only authority that in certain cases the conditions connected with the execution of a paper may be shown. But they cannot be considered to mean that the legal effect of an instrument may be altered by parole evidence long after the real transaction, when its effect will be to deprive creditors of their security. 75

Circuit Judge Manton in writing the prevailing opinion herein says:

> "The release here does not contain any limitation which would indicate an intent at the

76 time of its execution, of a conditional delivery so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation and thus defeat the claims of other creditors. The appellant was an attorney at law, although not actually engaged in practice. He had full opportunity to read and understand the force and effect of the document he executed. He released the whole world from payment of the sum involved. He represented not only to the Stock Exchange members, but to everyone that so far as he was concerned, his
77 son owed him nothing for the Stock Exchange membership. Nor can we support the claim of the appellant, because he received interest on the loan of Seventy-five Thousand Dollars from his son against this sealed and solemn instrument of release. We think he is estopped from asserting his claim."

The only case cited by the petitioner which is at all applicable to the facts of this case is Sterling vs. Chapin (185 N. Y. 395) which we have already distinguished. Judge Manton says of that case that the action there was for an accounting between
78 the parties.

The brief of the petitioner is based upon the assumption that the parties intended the release to be operative only so far as the Stock Exchange seat was concerned. We challenge this assumption and say it was only after the bankruptcy that the petitioner conceived that idea. Eliot Atwater says (Record, page 27):

"I understood from the papers there was no claim against me legally by him." 79

Edward S. Atwater, the appellant, says at folio 119 of Record, his son never made any statement to him relative to the money or made any agreement with him for the repayment of the same and that he had no memorandum or promise.

In view of the testimony just quoted how can it now be claimed that the intention of the parties was to preserve the debt, and that therefore it can be claimed a limited effect of the release should recreate the debt as against creditors, which was 80 created without any reservations whatsoever in the releases or between the parties?

POINT V.

THE PETITION SHOULD BE DISMISSED AND THE WRIT OF CERTIORARI PRAYED FOR SHOULD NOT BE GRANTED.

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ATWATER v. GUERNSEY ET AL., TRUSTEES IN BANKRUPTCY OF ATWATER, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 511. Submitted December 14, 1920.—Decided January 3, 1921.

Petitioner advanced his son the money to buy a seat in the New York Stock Exchange and to pay the initiation fee, executing releases to the son which were filed with the Exchange in compliance with its rules, and the son paid interest on the amount advanced. The evidence showed that the advance was intended as a gift and that the interest was paid as a moral obligation merely. *Held*, irrespective of the technical operation of the releases, that the petitioner had no valid claim to reimbursement against the trustee of the son's firm in bankruptcy.
266 Fed. Rep. 278, affirmed.

THE case is stated in the opinion.

Mr. Abram J. Rose for petitioner. *Mr. Frank B. Lown* was also on the brief.

Mr. R. D. Whiting for respondents. *Mr. C. W. H. Arnold* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from an order expunging a claim of the petitioner, Edward S. Atwater, against his son, Eliot Atwater, a member of the firm of Atwater, Foote and Sherill, adjudicated bankrupts. The claim is for $75,000 furnished by the father to the son, to enable him to buy a seat in the New York Stock Exchange and to pay his initiation fee. The seat was bought and the use of it was

contributed to the firm by Eliot Atwater, the seat remaining his individual property, as the Master and both Courts have found, and as we see no reason to doubt. In connection with the purchase, as required by the rules of the Stock Exchange, Edward S. Atwater executed a release of all claims against Eliot Atwater, "and more particularly by reason of an advance of the sum of ($73,000) Seventy-Three Thousand Dollars, made to said Eliot Atwater, to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange." There was a second release with a similar special clause covering $2,010, to enable the son "to pay his initiation fee to the New York Stock Exchange." The Master and both Courts considered the release a bar to the appellant's claim.

It hardly was necessary to reach that point, as it seems to us obvious that whatever moral obligation was considered to remain, both father and son understood at the time of the transaction that no legal obligation arose from the advance, and the release expressed the fact. There is no doubt that the release was intended to be an operative instrument, at least so far as creditors who were members of the Stock Exchange were concerned. That being so it would be going very far to allow a cotemporaneous parol understanding to be shown that it should not do the very thing that on its face it specifically purported to effect. But we find no such understanding. It is admitted that no document ever was given to show it. The father testified that his son never agreed to repay the money and that nothing was said about repayment; the son testified that he understood that there was no claim against himself legally. It is true, no doubt, and natural that he should have considered that there was a moral obligation, and in pursuance of it interest was paid to the father until the bankruptcy. It is true, also, that father and son in their testimony use some phrases that favored the present claim. But we are satisfied that,

at the time, the release was given in good faith, and meant what it said without equivocation or reserves. It is unnecessary to consider whether the Circuit Court of Appeals were successful in distinguishing *Sterling* v. *Chapin*, 185 N. Y. 395, from the present case, on the assumption that the parties attempted to qualify the release. More need not be said to show that the decree should be affirmed.

Decree affirmed.